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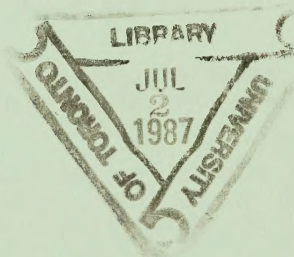
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STANDING COMMITTEE ON RESOURCES DEVELOPMENT

LABOUR RELATIONS AMENDMENT ACT

TUESDAY, FEBRUARY 25, 1986

Morning Sitting



STANDING COMMITTEE ON RESOURCES DEVELOPMENT

CHAIRMAN: Laughren, F. (Nickel Belt NDP)

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Smith, E. J. (London South L)

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Stevenson, K. R. (Durham-York PC)

Taylor, J. A. (Prince Edward-Lennox PC)

Substitutions:

Haggerty, R. (Erie L) for Mr. Callahan

Johnson, J. M. (Wellington-Dufferin-Peel PC) for Mr. Pierce

Lane, J. G. (Algoma-Manitoulin PC) for Mr. Stevenson

Also taking part:

Wrye, Hon. W. M., Minister of Labour (Windsor-Sandwich L)

Clerk: Decker, T.

Staff:

Revell, D. L., Legislative Counsel

Witnesses:

From the Ministry of Labour:

Armstrong, T. E., Deputy Minister

Pathe, L. V., Assistant Deputy Minister, Industrial Relations
Division

STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Tuesday, February 25, 1986

The committee met at 10:17 a.m. in room 228.

LABOUR RELATIONS AMENDMENT ACT, 1985

Consideration of Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: The resources development committee will come to order. We are here to discuss Bill 65, An Act to amend the Labour Relations Act, commonly known as first contract legislation. We have with us the Minister of Labour (Mr. Wrye) and some of his people, whom I am sure he will introduce.

This morning we want to walk through the bill clause by clause so when presentations are made to us in the public hearing part of our role, there will be a clear understanding of the legislation by all committee members.

Because the ads were late getting into the papers, response has been tepid so far. We have not had very many responses, particularly for next week. I think we should be a bit laid back about that and give it another day, because the ads did not go in until late last week. In a couple of instances, ads were late in getting out to small papers in the north because of fog and so forth. Tomorrow we will make a firm decision as to what we will do in Sudbury and Thunder Bay next week and whether to proceed with that.

Are there any questions before we begin? You all have your schedule and a copy of the bill.

Hon. Mr. Wrye: It is always good to be back in the resources development committee.

Mr. Taylor: Smile when you say that.

Hon. Mr. Wrye: It is, Mr. Taylor. It is a place where I have had more than a few hours of entertainment and enjoyable discussions with my fellow members.

If I might, I intend to make a brief opening statement, then turn matters over to my officials to begin going through the detailed aspects of Bill 65.

As I said, I am very pleased to appear before members of the committee this morning because this appearance means we are now at the beginning of the committee's important deliberations on Bill 65.

As we all know, the bill received a great deal of attention in the Legislature, in the business and labour community and in the media. This wide attention and the controversy that is

engendered are indicative of the significance of the issue for the various groups affected. In turn, this significance is reflected in the rigorous schedule of public hearings that the committee has planned over the next five weeks throughout the province: Sudbury, Thunder Bay, Ottawa, Windsor and London, and here at Queen's Park. I commend the chairman and members of the committee for extending to the public the widest reasonable opportunity to come before this committee.

I will be listening with interest to what the committee says in the weeks ahead. I particularly want to hear your thoughts on four issues I would like to identify for you.

The first of these issues is the question of access to arbitration and the effect of subsection 40a(2) of the bill. Second, I am interested in hearing your views on the reasonableness of the time limits contained in the bill regarding the question of access to arbitration and during the arbitration itself. Third, I am concerned with whether the board of arbitration should consider bargaining conduct when settling the terms of a first agreement. Finally, I have received representations from members of the construction industry that the blanket exemption from first contract arbitration is too broad. Therefore, I shall be interested to hear representation on this issue.

I recognize of course that the committee will be dealing with many important matters, but I wanted to flag these four since they particularly engage my attention.

I would also like to mention that the government has already decided upon three specific amendments--there may be more to come--which are intended to clarify implementation of Bill 65. These amendments--I believe they are being distributed now--will be introduced later, but at the end of this statement we will share them with members of the committee. I thought it would be useful to briefly outline them now for your benefit. I am providing copies of the amendments for your use.

The first amendment deals with the technical issue of how concurrent termination applications are to be treated. The thrust of our proposal is to give the Ontario Labour Relations Board discretion in how it will hear such applications. This discretion closely parallels the powers of the board under subsection 103(3) of the act when considering concurrent certification applications. The proposal also would provide that no termination application can be made once the board has directed the settlement of a first collective agreement by arbitration.

The second amendment limits the power of the board of arbitration to make the terms of the first collective agreement retroactive. The proposal would provide that no first collective agreement settled by the board of arbitration may be retroactive beyond the date on which notice to bargain was given pursuant to section 14.

10:20 a.m.

A third and final amendment is designed to fill out the powers of the board of arbitration so it may properly carry out its function. For the most part, these powers are the same as those exercised by arbitration boards appointed under the Hospital Labour Disputes Arbitration Act. For example, the amendment gives the board of arbitration the power to summon witnesses and to enforce their attendance.

The government believes this legislation is an important part of our attempt to strengthen the collective bargaining process within this province. In particular, this bill would ensure that relief is provided where collective bargaining has been frustrated without undermining serious attempts to freely negotiate a first collective agreement.

Mr. Chairman, I thank the committee for its attention. My officials, Tim Armstrong, Deputy Minister of Labour and Vic Pathe, Assistant Deputy Minister of Labour of the industrial relations division, are here and available for your benefit to explain the bill section by section in accordance with your wishes and that of the committee.

Mr. Chairman: Thank you. I think the best way to proceed is simply to start at the beginning and take it clause by clause. I encourage members of the committee to raise any questions at all. Do not hang back because you think you do not know enough about the law or this particular piece of legislation. It is important that we all have a clear understanding of it.

Mr. Armstrong, can we turn it over to you?

Mr. Armstrong: The first section is a new section, 40a, of the Labour Relations Act. It is the section that establishes the timeliness of an application for a first agreement and provides that where the parties, that is the employer and the trade union, the bargaining agent, are unable to effect a first collective agreement, and the minister has released a notice that it is not considered advisable to appoint a conciliation board or has released a report of a conciliation board, either party, that is to say, either the employer or the trade union, may apply to the board to direct the settlement of a first collective agreement by arbitration.

The ministerial power to issue what it called a no-board report or to appoint a board of conciliation is contained in section 19 of the act and it is that action by the minister that starts the clock running in terms of the right to strike. We can get into the details if it is of interest to the committee, but essentially once that step is taken, if a no board report is issued, the union is in a legal strike position 14 days thereafter.

If a board is appointed, which has been increasingly rare in recent years, the right to strike descends seven days after the release of the decision by the minister to appoint a conciliation board. As soon as either one or the other of those two decisions has been taken, either party is in a position to request the board through an application to invoke its power to direct a first agreement.

I will pause there as that brings us to subsection 2, which deals with considerations of the board in determining whether to act affirmatively in response to such a request.

Mr. Taylor: In subsection 40a(1), you mentioned either one of two things has to happen. But as I read this, there is an "and" in there: "Where the parties are unable to effect a first collective agreement and the minister has released..." It looks like a combination of factors.

Mr. Armstrong: That is true. Let us roll it back a bit. When the union is certified, it serves notice of desire to bargain and that must be done. Is there a time limit on that?

Mr. Pathe: Within 15 days of the certification.

Mr. Armstrong: Then bargaining takes place and a conciliation officer is appointed. If during that process and with the conciliation officer's help they are unable to conclude a collective agreement, the conciliation officer reports to the minister that a collective agreement cannot be achieved in a voluntary way.

Depending on the minister's assessment of that report, he may either appoint a conciliation board or say there is no point in having a conciliation board, in effect, let the clock start to tick down to the strike date. You have to have a situation in direct negotiations where they have failed to conclude a collective agreement and the minister has taken one or the other of these steps, either appointed a board or said, "Let no board be appointed."

Mr. Taylor: Is there a time limit, six months or something, to conclude a contract before an application for decertification takes place?

Mr. Armstrong: You have raised two things. The six-month period you have raised relates to the period after which employees may return to work voluntarily and demand their old jobs: any time up to six months after the commencement of the strike. That is one question. Your real question is, when will an application for termination of bargaining rights be considered. That will be considered after one year from the date of certification.

Mr. Taylor: I do not want to anticipate anything here, but I gather that getting into the concept of first contract could avoid decertification proceedings.

Mr. Armstrong: We will come to that as we proceed sequentially through the provisions of the act. One of the amendments the minister placed before you this morning deals with the way in which the board might deal with a termination application that was received in the one year following the date of certification if concurrently there happened to be an application for a first agreement.

Realistically, any application for a first agreement is likely to be launched well before that one-year period in the

normal course. It seems to me it would become apparent to the parties whether there is the kind of impasse that would lead to the need for an application of that sort. Our anticipation is that it would be rare that termination applications and applications for the direction of a first agreement would bump up against each other. But it is conceivable, and the amendment the minister introduced deals with that issue.

Mr. Taylor: I guess I am getting ahead.

Mr. Armstrong: We will be coming to it later.

Mr. Chairman: Could you lay out a typical but hypothetical scenario of how the whole thing could come about, including time frames?

Mr. Armstrong: Let us say the trade union acts as certified on April 1.

Mr. Chairman: To be recognized as the bargaining unit.

Mr. Armstrong: To be recognized as the bargaining agent for the employees within a defined unit. That has all been preceded by an Ontario Labour Relations Board hearing. The trade union has had to produce evidence of membership to show it has the support of 55 per cent or more of the employees if it is an automatic certification and 35 per cent for a vote.

Either by way of a vote or by way of automatic certification, the labour board has issued a certificate to the trade union. The trade union then is armed with that certificate. Under section 14 it gives notice of its desire to bargain with a view to making a collective agreement. Section 15 of the act provides that the parties shall meet within 15 days from the giving of notice and bargain in good faith, making every reasonable effort to make a collective agreement.

10:30 a.m.

Let us say it gives notice to bargain on April 10. The parties have to meet within 15 days, and they do so. We are then to April 25. They can bargain directly without the assistance of a conciliation officer for a length of time that will be determined by the kind of progress they are making in direct negotiations without the assistance of a conciliation officer. However, if they run into difficulties, as normally they do in a first-collective-agreement situation, then either party can ask request the minister to appoint a conciliation officer under section 16 of the act. I am not saying in this situation that they bargain till the end of May, when they would make an application for the appointment of a conciliation officer and--

Mr. Taylor: There is no time frame for that.

Mr. Armstrong: There is no time frame for the making of the application. The minister's obligation is to appoint forthwith, I believe.

Mr. Pathe: They are entitled to conciliation any time after they have given notice to bargain if 15 days have elapsed.

Mr. Armstrong: Yes, but they are not untimely if they wait for two or three months. They can be in direct negotiations for quite a long time.

Mr. Pathe: For months.

Mr. Taylor: There is no onus on the minister to appoint one to meet with either.

Mr. Armstrong: No, there is not.

Mr. Chairman: There must be a request for a conciliation officer by one of the parties.

Mr. Armstrong: There has to be a request.

Hon. Mr. Wrye: By one of the parties.

Mr. Armstrong: That is right. Subsection 16(2) requires the minister, upon their request, to appoint the conciliation officer to confer with the parties in an endeavour to effect a collective agreement. In our example, we say that would happen on May 1.

Mr. Chairman: You said May 30.

Mr. Armstrong: Was that May 30?

Mr. Chairman: Yes.

Mr. Armstrong: Under subsection 18 the conciliation officer is obliged to confer with the parties and to endeavour to effect a collective agreement, reporting to the minister within 14 days of his appointment. That is what the act says. The time limit of 14 days is what we used to call, in arguing cases before the courts, directory rather than mandatory. It is the target that is mentioned in the act and it is more often observed in--

Mr. Chairman: The breach.

Mr. Armstrong: Yes, it is more often breached than observed, but in the construction industry, of course, it is mandatory.

Let us say we are at May 30. The conciliation officer acts with great expedition, he reports within 14 days and his report is received about the middle of June. On the receipt of the report, which is submitted to the minister confidentially and is not circulated to the parties. The minister must then make a determination, given the substance of the report, on whether any purpose would be served in appointing a conciliation board, which is a three-person tribunal--the chairman, a labour representative and a management representative--to hear the representations of the parties and to assist them in concluding a collective agreement, or whether the most likely inducement to the conclusion

of a collective agreement would be simply to say, in effect, that no purpose could be served in appointing a conciliation board; the issues have been very clearly defined, the positions of the parties are well set out and the ambit of the dispute or the content of the dispute is well understood.

The time should start to run, the theory being that under the time gun, the likelihood of both parties moving closer together and attempting to avoid the imposition of economic sanctions will be the best method of inducing them to come together and conclude an agreement.

Mr. Chairman: If on June 25 the minister, having read the report of the conciliation officer, decides that no further use would be served by conciliation, that is what is known as a no board. He does not appoint a board.

Mr. Armstrong: That is right.

Mr. Chairman: That brings us to this bill, does it not?

Mr. Armstrong: At that point it brings us to this bill. You will note that the bill provides that either party is in a position to apply to the board for a direction at any time after that point, and it could very well be that the decision to do so--just so we are clear--could be made after the trade union had elected to commence strike action or, indeed, after the employer had elected to lock out. There is another provision of the bill that we will come to, but if either party elects to apply to the board and if the board grants its request, then any strike or lockout then in progress is brought to an end and we are onto another track; we are onto an arbitrated track.

Mr. Chairman: Just to be clear, once that no-board report comes in on, say, June 15, the very next day a number of things could happen: a strike, a lockout or either party could apply for first-contract negotiation.

Mr. Armstrong: It could not happen immediately. The strike or lockout thing is governed in this way. The act says that 14 days must elapse. The computation of that 14 days, because of the way in which the act is written and how mail notices are construed, actually turns into 16 days. It is at 12:01 a.m. on the 17th day after the giving of the no-board report that a bargaining agent and the employees are in a position to strike or that an employer is in a position to lock out. You do not have economic sanctions until that happens, but you have them at any time after the receipt of the minister's notice that section 40a comes into play and they are in a position to invoke it.

Mr. Chairman: Right. It has nothing to do with 14 days in this section.

Mr. Armstrong: No.

Mr. Mackenzie: Can you go over that 14 or 16 days again?

Mr. Armstrong: Yes. If you will just give me a minute about the timing on this, I think I can do it.

Mr. Taylor: Is there a distinction between calendar days and clear days in a legalistic sense? What do you do to calculate it?

Mr. Armstrong: It is calendar days. It has been 10 years since I have done this. I used to know the name of the clauses in here.

Mr. Taylor: That is almost a decade.

Mr. Armstrong: Help me out, Mr. Pathe. Have you got your act there? What is the timing there?

Mr. Taylor: You are trying to find the exact number of days that enables a party to the strike after a--

Mr. Armstrong: Yes. Subsection 113(3) says, and I am reading selectively:

"a notice from the minister that he does not consider it advisable to appoint a conciliation board...

"(a) if sent by mail to the person...shall be deemed to have been released on the second day after the day on which it was so mailed."

That is why you have got two days added to the 14 days.

Mr. Taylor: Deemed to have been received.

Mr. Armstrong: Deemed to have been received on the second day after--

Mr. Taylor: After the date of mailing.

Mr. Armstrong: Yes.

Mr. Taylor: That is in times of good mail delivery.

Mr. Armstrong: That is exactly right.

Mr. Taylor: Why is that?

10:40 a.m.

Mr. Armstrong: That is why you get 12:01 on the 17th day as the legal day.

Mr. Chairman: Are there any other questions on section 40a?

Mr. Mackenzie: Yes. Before we leave that, the second day that the notice is deemed to have been received, we were talking about the 14 days. I am talking about when you are legally entitled to strike after a no-board report.

Mr. Armstrong: Yes. That is another section that I thought you were going to raise with me, which is earlier in the act. Subsection 72(2), again reading selectively; says:

"Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the minister has appointed a conciliation officer or a mediator under this Act and,

"(a) seven days have elapsed after...the minister has released...to the parties the report of a conciliation board or mediator; or

"(b) 14 days have elapsed after...the minister has released or is deemed pursuant to subsection 113(3) to have released...a notice that he does not consider it advisable to appoint a conciliation board."

Those are the triggering sections for the running of the clock in either the seven or the 14 days, depending on what route the minister decides to take, either a board or a no board. Then there are follow-up provisions about prohibiting strikes prior to the expiration of those time periods. Really what you have to look at is the combined effect of clauses 72(2)(a) and (b) and subsection 113(3) to get the total picture of when a strike is timely.

Mr. Mackenzie: I always wondered why it did not follow section 19 in some way.

Mr. Armstrong: Yes. The sequence of those sections is kind of confusing. You can see it takes a lot of time when you have not been around it for a while.

Mr. Taylor: What is the rationale for the difference?

Mr. Armstrong: The difference, the seven versus the 14?

Mr. Taylor: Yes.

Mr. Armstrong: Let us say a conciliation board reports and the report is released. The parties have to assess what is in the report, and why they need less time to consider that than they would to consider their position after the issuance of a no-board report is a good question. The answer, as Mr. Pathe may tell you, may be that the really tough, meaningful mediation takes place in that 14-day period. I would think that the author of the act, Professor Finkelman, would have said that you need at least 14 days to have a good last shot at a voluntary settlement, whether or not you need the same length of time to consider your position in the light of a conciliation board report.

Mr. Pathe: Yes, because in theory at least--and when we used to have boards, in practice--the boards mediated in the way that the mediator does during the 14 days, so they have been through that process. I am sure the people who wrote the act in those days said that most of the work had been done and that seven days was really enough for them to decide whether they were going to accept the recommendations of the board or whether they were going to slug it out.

They probably went at it the other way, though, saying, "If we are going to no board, if we are not going to have that step, then we ought to allow more time for the parties to negotiate and mediate before the strike or lockout becomes"--

Mr. Taylor: So they are counting the board's activities as an extension of the time frame for the parties to think things out?

Mr. Pathe: Typically a board would extend the process by three months. That is why there has not been a board since 1977, and prior to that there had not been one since 1966.

Hon. Mr. Wrye: I go through about 10 reports from conciliation officers a night. As Mr. Pathe points out, traditionally we recommend that they be no boarded. I usually go through the report of the officer, sometimes in some detail, and what Mr. Armstrong and Mr. Pathe have said about the clock beginning to run for 14 days is very true. It is not unusual at all for the conciliation officer to say: "I received a request from the employer, the trade union or both to wrap up my aspect of the bargaining. I have narrowed a lot of the issues, but now the parties believe that only with the clock ticking will they get down to the real nitty-gritty of working out the three or four major issues."

That is often what you will have. You will have started with a lot of issues on the table. They will have cleared away all but the very crucial issues, and even one or two of those, but they need the pressure of that strike date or lockout date, as the case may be, as Mr. Armstrong said, to take their final shot at the settlement. It is not unusual at all. Given the number that I sign every day; given the number of strikes there are at any one time, and the number of strikes in the province now; the vast majority of those that have gone through the conciliation officer are settled without a dispute. Is it 90 per cent to 95 per cent, Mr. Pathe?

Mr. Pathe: About 94 per cent or 95 per cent without a strike.

Hon. Mr. Wrye: It is not an unusual process. With the aid of the officer, the parties have got down to narrowing the issues; and when the crunch comes in the last 14 days, they know the issues on the table are the crucial issues between the parties. They are not always wages. They can be any number of issues. Use your imagination. What can be very critical issues to the parties may seem to outsiders to be fairly small, but to the parties they are the most meaningful issues around.

Mr. Lane: This does not relate directly to this section. For general clarification, and not being up on my labour laws as I should be, I understood someone to say--perhaps it was the minister in the House--that this does not reflect the construction industry. If that is the case, why not?

Mr. Armstrong: You refer, Mr. Lane, to subsection

40a(18) of the act as set out in section 1 of the bill, which is the second to last subsection of the bill.

Mr. Lane: It is a premature question, but to understand what we are talking about a little more, I wondered why they were not involved.

Mr. Chairman: Is there any other group this does not apply to?

Mr. Armstrong: No, it applies to everyone else. That is the only excluded group.

Mr. Chairman: Perhaps that is a question to the minister to start with.

Hon. Mr. Wrye: A determination was made. As I said in my opening statement, Mr. Lane, I have had some representation from some of the construction unions that think the exclusion is perhaps too wide. We are going to be interested in hearing from them and hearing your views on the matter. There is no need for it with the industrial, commercial and institutional sector of the construction industry. As most will remember, in the so-called ICI sector, we have a system of single-trade, province-wide bargaining. Therefore, you have 26 agreements that last for two years and come up for renewal this spring. When these agreements are renewed, if a craft union gets certified, the act provides that it pick up that agreement. There literally is no bargaining. The law says the agreement applies from the date of certification.

In the ICI sector, which is the heart of the construction industry, there is no need for first-agreement arbitration. In fact, it would be incompatible with the scheme of the act if you had it. There are other sectors, residential, sewer and water main, heavy construction, where they are not on automatic pickup, and in theory at least you could have the need or the desire on the part of either the union or the employer to go to first-agreement arbitration.

Some characteristics of the construction industry are different from those of other sectors. They make the need not nearly as urgent as it is in industry at large. What do I mean by that? It is quite common for an employer to voluntarily recognize a union and to pick up the terms or to grant to it the terms of a regional agreement in one of these non-ICI sectors. That happens more often than not. Voluntary recognition is a common feature in the construction industry.

This basically is the pattern, although sometimes there are legitimate certification disputes followed by legitimate bargaining disputes. Let us say the carpenters' union or the operating engineers say: "We are not making out within this bargaining, and the employer will not agree to have the local agreement apply. We need first-agreement arbitration." It would be inaccurate to say there is no need; there may be some need.

Mr. Taylor: Are craft unions all closed shops then?

Mr. Armstrong: No, they are not.

Mr. Taylor: Do you have to belong to the union to get a job?

Mr. Armstrong: They are not all closed shops. Closed shop is a common feature to many of them.

Mr. Taylor: Maybe I am being pedestrian rather than technical in my question. In my experience, in some cases you have had to get a certificate from the union to become engaged by an employer if you are not a member of that union. There is still that requirement.

Mr. Armstrong: Yes, it is very common.

Mr. Taylor: I am following Mr. Lane's question. You addressed your reply mostly to the industrial, commercial and institutional sectors where you have province-wide bargaining. Is it prevalent in these areas that, before you are engaged as a worker you must belong to the union in any event. I am talking of a person who is a member of, say, one of the craft unions. If anything, this would be contradictory to the process already in place.

Mr. Armstrong: I think there is a difference between the requirement for union membership, which is contained in the collective agreement, either in the provincial agreement or in local agreements, and the need for first-agreement arbitration.

Even though fundamentally the carpenters' union has a closed shop, as you point out, it is possible it could not conclude an agreement with a local contractor. If that were the case, the carpenters ultimately might conclude that the closed-shop provision of the agreement is of no assistance to the conclusion of the agreement, except to the extent that the contractor was worried about getting jobs on sites that required subcontractors to be under a contractual relationship with one of the American Federation of Labour craft unions, but that is another subject.

Mr. Taylor: I am thinking of when there is a requirement in the contract that the work force be unionized.

Mr. Pathe: They are not required to be members of the union of a nonunion contractor. When the union is certified as the bargaining agent for a contractor, there is still no requirement for that contractor to use only union members. That only happens when the collective agreement is entered into, so the requirement to be a member--

Mr. Taylor: That collective agreement is province-wide.

Mr. Pathe: It is in the industrial, commercial and institutional sector. In the ICI sector, the minute the contractor is certified the contract applies, and yes, you have to be a member. In the non-ICI, it is slightly different.

Mr. Armstrong: It would be inconsistent with the act to

have first-agreement arbitration in the ICI sector. That is beyond--

Mr. Taylor: That is what I was addressing.

Mr. Pathe: No question.

Mr. Lane: I am sorry if I threw us off schedule, but I wanted to clarify that because I could not understand why we were closing out certain protection vehicles.

Mr. Mackenzie: Going back for a moment to the time schedule you asked the deputy to go through, as I see it we have a situation now where under ideal conditions certification is achieved April 1, and if everything goes according to the time schedule, you are in a position to lock out or strike July 1.

Hon. Mr. Wrye: That was on the time schedule the deputy offered. It certainly is possible that a union certified on April 1 could give notice to bargain that day. Bargaining then must take place within 15 days. I am going by the tightest time frame. Bargaining takes place on April 16 or 17. The union can give notice of request for conciliation that day or--

Mr. Pathe: Fifteen days have to elapse from the giving of notice to bargain before the minister can grant conciliation.

Hon. Mr. Wrye: The union can ask for conciliation immediately. It can move out of conciliation very quickly, if that is its desire. I know you understand what then follows with the access issue and we will deal with that in a second.

Let us say we have the worst possible scenario: Certification has preceded only with the greatest degree of difficulty and there appears to be an ongoing situation where the employer has really not recognized the bargaining authority of the trade union. We figured out at one point that within 35 or 40 days the trade union would be in a position to ask for access. Remember again that as soon as my decision is made not to have a conciliation board, even as the clock ticks towards the 14 days to strike or lockout, the trade union could put in a request for access to arbitration.

Mr. Chairman: When you say right to access, what do you mean?

Hon. Mr. Wrye: That is when we get into subsection 40a(2), because access to arbitration is not automatic.

Mr. Chairman: Under this bill?

Hon. Mr. Wrye: That is right.

My point is that in the situation you may have a desire to get to a determination of whether access to arbitration will be given quickly. Presumably the party is confident that access will

be granted just as quickly as it can get there. The clock can tick rather quickly in this case.

11 a.m.

In the instance the deputy pointed out, we essentially started the process April 1 and went three months. It can be much narrower than that. We could give you an exact time, but I think it can be done in about 35 days, if I am not mistaken.

Mr. Mackenzie: I recognize that we allowed 10 days for the notice and a month and a half for bargaining.

Hon. Mr. Wrye: We do not have to allow any of that.

Mr. Armstrong: Just for clarification, the giving of notice under section 14 and the requirement to meet within 15 days is there. That is 15 days after the notice. Then the minister appoints a conciliation officer. That takes--

Mr. Pathe: Five days from receipt.

Mr. Armstrong: --five days. I am not adding all this up; somebody else can do that.

Mr. Pathe: I am.

Mr. Armstrong: Then the conciliation officer reports in 14 days. The minister may take a day or two--

Hon. Mr. Wrye: I sign that very night.

Mr. Armstrong: --to make a determination. What does that add up to?

Mr. Pathe: If you take two days for that, it totals 36 days.

Mr. Armstrong: In fairness, that is a fast track.

Mr. Mackenzie: That is the point I am getting at.

Mr. Armstrong: If you were to go into the records of what is a norm, you would not find that to be the norm.

Mr. Pathe: In many cases, the parties have not even met within that period of time. They begin to meet with the membership to formulate contract proposals following certification.

Mr. Mackenzie: What is the norm now? Do we have any figures on that?

Mr. Pathe: I think we could get them. I do not know that we have them. I guess it is around six months from certification to when the first collective agreement is concluded.

Mr. Mackenzie: That is the point I was going to make. You have a fairly fast track even at three months using the

deputy's track. I suspect that the actual time is closer to six months.

Mr. Pathe: The union has control of that. For example, the reason the conciliation does not take place within the 14 days is because we have a system of conferring with the parties. We are dealing with union representatives who are very busy and have busy schedules. Employer representatives are in the same position. When we arrange dates to suit, that takes time. Neither side would want us to set dates at conciliation arbitrarily, to say that the officer who is appointed today is going to meet the day after tomorrow and call a meeting. It would not be conducive to having the process operate.

Mr. Armstrong: On the other hand, to pursue what I understand Mr. Mackenzie's point to be, let us say that a union had determined it was dealing with an employer who was unlikely to conclude a collective agreement and was aiming at first-agreement arbitration. That union could force the system, and the system can be forced within 36 to 40 days.

Hon. Mr. Wrye: Using the example the deputy has given and as Mr. Pathe has pointed out with the six months, as long as the process is proceeding, the clock can run a little longer because the parties have no pressure. In fact, they want it to run because not only is the clock running but also something positive is happening as they move to a more positive conclusion.

I would see this very narrow 35-day or 36-day fast track, or something not much longer than that, given that we have no automatic access, as a threshold test. A party that wished to go on that kind of a fast track would have to be very confident of receiving permission to get a first contract through arbitration to want to go on that kind of a fast track.

Mr. Mackenzie: I am not at all sure they would want to go quite that fast.

Hon. Mr. Wrye: I do not know that they would want to. Only in the most extreme situation would a trade union or an employer not attempt to see whether some movement or progress could be made.

Hon. Mr. Wrye: As an addendum, not tied to the bill and for those who have not heard, President Marcos went into exile this morning.

Mr. Taylor: To where?

Hon. Mr. Wrye: I do not know.

Mr. Ramsay: Minaki Lodge.

Hon. Mr. Wrye: They are back to having one president in the Philippines.

Mr. Chairman: He could even turn up at Camp David.

Interjection: He is substituting on this committee next week.

Mr. Chairman: He needs the money.

Mr. Haggerty: On a point of clarification, we are moving from the 15-month collective agreement for second conciliation. You have 15 months before you can bring them back to the bargaining table. We are looking at 30 days, if I interpret the act under the new section 40a; report within 30 days of receiving the thing. I have an old copy of the act and maybe it is not up to date. It says you are dealing with negotiation of collective agreements. That is the first contract. If I interpret the section it says that--

Mr. Armstrong: What section are you looking at?

Mr. Chairman: Have you the Labour Relations Act, Mr. Haggerty?

Mr. Haggerty: I am on subsection 4 of--

Mr. Chairman: You are on subsection 16(4).

Mr. Haggerty: Yes, that is right, where it says 15 months. Does that remove the 15 months? This will expedite it in 30 days. That is what I am looking at.

Mr. Armstrong: That is quite a different thing. If it has ever been used, I am not aware of it. That is in the case of very prolonged labour negotiations where there is a stale conciliation. There even may have been a conciliation report.

Mr. Haggerty: That is what I gathered. This would be the second one.

Mr. Armstrong: The parties are still locked in combat and cannot get out of it. This gives them the right to apply jointly if they both agree to recycle the operation and to go again for conciliation. In 12 years, I cannot remember a joint request for second conciliation.

Mr. Haggerty: Maybe we should have that section totally removed from the act. We should remove "15 months." As long as you leave that sitting there, somebody may think they can prolong it this way instead of keeping within the 30 days and getting down to the meat of settling the issues.

Mr. Armstrong: At worst, it is an unused section. I do not think it really misleads anybody.

Mr. Haggerty: Somebody with a legal mind will say they can prolong things using that section.

Mr. Armstrong: Beware of people with legal minds.

Mr. Chairman: We are not here to pillory the lawyers, despite the desires of many members of the committee.

Mr. Haggerty: Maybe we should take a look at that.

Interjection: That is a very unfair comment to make with the only lawyer on the committee out of the room.

Mr. Chairman: We now are on section 40a(2).

Mr. Armstrong: As the marginal note indicates, this is the duty of the board when it receives an application under subsection (1). The board is required to consider that application and make its decision within 30 days of receiving it. It goes on to say that the board "shall direct the settlement of a first collective agreement by arbitration where it appears to the board that collective bargaining has been frustrated because of,

"(a) the refusal of the employer to recognize the bargaining authority of the trade union;

"(b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;

"(c) the failure of the respondent to make reasonable efforts to conclude a collective agreement; or

"(d) any other reason the board considers relevant."

Mr. Taylor: Who is the respondent in that?

Mr. Armstrong: The respondent in this case could be--

Mr. Taylor: Either party.

Mr. Armstrong: Yes. Either party.

11:10 a.m.

Mr. Taylor: What struck me was that there might be an uncompromising nature on the part of either one of the parties.

Hon. Mr. Wrye: If it was the uncompromising nature of the applicant's bargaining position, the board would probably not be desirable to moving to grant access. The board would probably suggest that the applicant was the problem.

Mr. Armstrong: As Jim will know, it would be an application of the clean-hands principle. You could not come and ask for the relief when you yourself had been guilty of the conduct on which the relief was based.

Mr. Taylor: That is a judgement call, though, that you are going to have make. Maybe it is a bad-faith reading of something.

Mr. Chairman: This could be in the middle of a strike, right?

Mr. Armstrong: Yes.

Mr. Chairman: The strike could be ongoing and the employer could be the one who invokes it and says, "I do not want to go through this any more; I want these guys back at work." There would be nothing wrong with that, would there?

Mr. Armstrong: I thought you were going to go on to say, "and do it on the basis of his own uncompromising position."

Mr. Chairman: Right.

Mr. Armstrong: That was implicit in what you were saying. If that is a possible construction of the section, the section is flawed. We have legislative counsel Don Revell with us. I do not say this in any personal way, but I think that would be a perverse reading of the section.

Mr. Taylor: I have already confessed to that. I was wondering whether it was still possible.

Mr. Armstrong: I defer to counsel on that.

Mr. Revell: I agree with Mr. Armstrong. I think it would be perverse, but since it is going to be several weeks before we get to clause-by-clause, it would not hurt to take a look at it. When I receive the copy of today's agenda, I will consider it further, if that is agreeable to the committee.

Mr. Taylor: It just struck me that it could be invalidated by the respondent, whoever that might be. It could be by either party.

Mr. Armstrong: I think the situation postulates that would be covered. If you were relying on clause 40a(2)(b), you would have to find the respondent had been the one who had been guilty of advancing an uncompromising position without reasonable justification.

Mr. Chairman: Is the respondent automatically the one who makes the application, just by the use of the word?

Mr. Armstrong: No. The respondent is, by definition, the one responding to the application, as opposed to the applicant.

Mr. Chairman: I see.

Mr. Armstrong: I think your situation would be taken care of by the wording--I would hope all situations would be taken care of by the wording--but Don can look into it.

Mr. Mackenzie: It is spongy ground there.

Mr. Armstrong: I am not so sure of that. As I say, that is why I hire lawyers.

Mr. Chairman: That is why lawyers hire lawyers.

Mr. Taylor: That is reinsuring.

Mr. Chairman: Any other questions on subsection 40a(2)?

Mr. Mackenzie: I am just wondering if the minister has any further comments. We have had some discussions on clauses 40a(2)(a) to (d). That is probably the crux of this entire bill. It is the issue of access or right as against remedy in whatever form. The interpretation I and a number of people have on clauses (a) to (d) is that it is just a modification of bad-faith bargaining.

Hon. Mr. Wrye: That is not an interpretation we share, but we are more than willing to take a look at wording changes that will capture the intent that I have spelled out very clearly in first and second reading. The direction that the government has given on this legislation is that the right to access should be at a level greater than a demonstration of bad faith. We believe that is captured in the wording now.

Mr. Mackenzie: I would appreciate getting the clear interpretation of ministry lawyers on it, because a hell of a lot of others I have talked to do not have that interpretation.

Interjection.

Mr. Chairman: Mr. Armstrong, we are not debating the merits of the bill today, we are trying get clarification of the bill. The debate on it will come when we get into clause-by-clause. If you wish to clarify this section, that would be appropriate.

Hon. Mr. Wrye: Perhaps the deputy might clarify in a technical way, rather than engage in debate, the specific clauses that we think are separate from and go beyond the bad-faith test.

Mr. Armstrong: I am not now talking about the policy, I am talking about how we construe the section, to address your question in particular, why we think the test differs from the bad-faith bargaining test.

First, unlike section 15 of the act, there is no reference in section 40a(2) to bad faith. The reference in clause 40a(2)(b) is to reasonable justification, but there is no reference to bad faith. I am not saying this first point is decisive, but there is a principle of statutory construction to the effect that distinctions in statutory language are advertent, not inadvertent, so the absence of any reference to good or bad faith is the first point I would like to make.

Let us look at the structure of the clauses of subsection 40a(2). Again, I am stepping out of the role of deputy minister and talking as a lawyer, if I may. My understanding of the

jurisprudence in bad-faith bargaining cases is that in clauses (a) and (c) we have, either singly or in combination, the essential features of a bad-faith bargaining situation; that is to say, the refusal of the employer to recognize the bargaining authority of the trade union and/or the failure of the respondent to make reasonable efforts to conclude a collective agreement.

If you look at the key cases--Radio Shack, Irwin Toy, Canada Trustco, Eaton's, Molson Ontario Breweries Ltd., and Aristocrat Vinyl--and analyse those cases, that essentially is what they are saying in the bad-faith bargaining cases. From a legal point of view, the novel aspect to this section has three points.

First, it has to appear to the board that collective bargaining has been frustrated. That is a term that has not appeared before in the legislation. It does not appear anywhere in the legislation. It means that the parties have reached an impasse.

Let me pause there and say that the bad-faith bargaining section, which is section 15, is a test of the conduct of the parties. If you look at section 15 and the jurisprudence under it, and the cases where bad-faith bargaining charges have been upheld, you will find almost invariably, and I think without exception, that the board explicitly or by necessary inference has made a finding with respect to the motivation and intent of the respondent employer. I say "respondent employer" because in 99.9 per cent of the cases it is the employer that is the respondent.

11:20 a.m.

If you look closely at the cases to which I have referred, and the jurisprudence, you will find from those cases that the board--as indeed I think it must legally, or subject itself to judicial review--has to make a finding of motivation or intent. It has to find that the intent or motivation is contrary to the positive duty cast upon it by section 15.

Contrast that to clauses 40a(2)(b) and (d). First, dealing with clause (b), which is the core provision in the section, it addresses the minister's statement in the House, repeated this morning, that the bill intends to go beyond the bad-faith bargaining test. In my legal view, reading clause (b) closely, there is no requirement for the board to find any improper motivation or intent on the part of the respondent.

What it has to find are two things: an uncompromising position in bargaining by the respondent, and without reasonable justification. That for the first time permits, indeed requires, the board to inquire into the substantive nature of proposals. It is conceivable, therefore, that the party could be advancing a proposal on economic grounds--tough bargaining--and for the board to say:

"Given the fact that the general purpose of the act is to forward the purposes of collective bargaining," the preamble, "and given the fact that bargaining is clearly frustrated and you have reached an impasse, we have listened to your argument about the reasonableness of the justification for the uncompromising

position you have taken and we are not persuaded that the justification you have advanced should take primacy over the fact that there has been frustration and we are going to break the deadlock by giving you first-agreement arbitration.

"We are saying nothing about you having bargained in bad faith. We are not imputing motive to you. We are not imputing illegal intention to you. What we are saying to you is that, in our view, the overriding and primary consideration is to break the impasse and we are going to break it.

"Given the weighing, on the one hand, of the general policy of the act to permit collective agreements to be concluded, and on the other hand, to permit people to negotiate freely, we are not persuaded that your uncompromising position has permitted the first objective to be achieved. Therefore, we are making a direction: we are going to first-agreement arbitration."

That is not only a tenable construction of the section. Given the wording of the section and comparing it to section 15, it is the correct interpretation of the section. For a tribunal to take a different interpretation would be an error of law and a reviewable error of law. That is clause (b).

Before I leave that, I should just say that in the jurisprudence on bad-faith bargaining the board has said time and again that so long as there is a business reason advanced for a tough bargaining position it will not get into the substance of the proposal. It will not go behind tough bargaining.

That being the case, this is the window, the opening, the invitation, and it is the obligation on the part of the board to do that, to assess the nature and content of the bargaining proposal put forward by the respondent that is causing the blockage in the pipe. That really, in a truncated way, is the argument on the very radical significance of clause 40a(2)(b).

The other very important provision of the section is the last one, "Any other reason the board considers relevant." Let me say at the outset that this is not open-ended. That determination has to be made, again in my legal view, in the context of frustration.

Once the board has determined that there is an impasse and that none of the other subsections applies, I think it is entitled and obliged to consider other reasons that may be advanced, including what might be called externalities.

For example, let us take a situation where the application for first-agreement arbitration has been preceded by a series of unfair labour practices--a tough employer has committed a series of unfair labour practices and has either been found to have done so or has manifestly done so--with the result, as the adjudicator says, that there has been a chilling effect on the members of the bargaining unit.

When they go into bargaining, the employer knows his conduct has had this effect and that the effect has been to undermine the

authority and bargaining posture of the bargaining agent. Therefore, the bargaining agent is not in a position to advance what it would have to advance in order to sell a decent, reasonable and acceptable collective agreement.

Let us assume the board were persuaded of that and said, "Because of that, there has been a distortion in the relationship between these two parties, which we are satisfied of and which is external to any conduct in bargaining itself," which would be covered by section 15, "and therefore, for that reason we are going to direct that there should be first-agreement arbitration." That is one situation.

There is nothing in the act now--certainly not section 15, the bad-faith bargaining section--which would accommodate that situation. If the board attempted to accommodate it, it would be acting beyond its jurisdiction and committing a reviewable error of law. I think that is very important.

The other situations that come to mind fairly readily in clause (d), are the situations--I go back, as you do, to Tilco Plastics, Fleck Manufacturing, and there are probably many more--where there were externalities having to do with a labour dispute which had nothing to do directly with the conduct of the bargaining parties; where, for example, there has been a lot of local press about the nature of the dispute, where there has been police involvement, where there has been the presence of third parties such as security guards, dogs or whatever. It is almost like getting a fair trial in a jury case where the externalities have been such that the capacity of the parties, particularly the trade union, to bargain freely and get a decent shot at a collective agreement has been so badly distorted by these externalities that you can never recreate the climate in which a free negotiating situation should be operating.

In that situation, the board would be quite entitled, and on the appropriate evidence even obliged, to say: "That is the reason we should remove this situation from the usual context in which the general resolution is a strike, a lockout or you pole-axe each other until you bleed white. We are going to take it out of that situation and we are going to have first-agreement arbitration."

I have given you three or four examples of why I think this test is fundamentally and radically different from a bad-faith bargaining test. No doubt as the proceedings go on, you will hear from others who disagree with that. However, I put that to you and I put it on the record as my belief as a lawyer--I am not talking policy now--that we have a different test.

11:30 a.m.

Mr. Mackenzie: If the change is as dramatic as you indicate, obviously some of us do not agree, and a good number of your legal compatriots do not agree. If that is the case, what difficulty would the deputy have with a more open access based on some kind of time frame in the report of an officer rather than setting up what you are defending here as not being bad faith? It certainly raises questions as to how many interpretations we are

going to need of what is or what is not an uncompromising nature in the bargaining process.

If you go through enough bargaining, you can find a company sitting down and making a concession a week on very minor items, but the takebacks, union security or any number of other issues are non-negotiable from day one. It is very difficult, as I am sure the deputy knows, if there is any progress being made on any item at all, even though the fundamentals of that contract negotiating session may be being denied totally. Why go this route where you are going to have an argument, when, given some time frame, it could be done more simply with an access?

Hon. Mr. Wrye: Perhaps I should answer that. We are into an area where a determination has been made by the government. You raised an option which I would call time-limited automatic access. A further option would be to simply have automatic access. There are a number of variations one can put forward.

Mr. Taylor: Automatic access is mandatory access. What Bob was talking about is that it should be mandated.

Hon. Mr. Wrye: When I say automatic, I mean automatic access that would be granted with no threshold test. An access is simply a right. It can be done with or without time limits.

In order that the committee understands some of the options, although I am sure Mr. Mackenzie knows them, the trade union at a point shortly after certification could make the choice whether to take the automatic access route or to bargain collectively. Once having entered the collective bargaining path with the right to strike or to be locked out at the end of that collective bargaining process, a union would either not be able to get arbitration or would only be able to get it on a much tougher test, such as bad faith only.

The government will be interested in hearing the views and the determination of the committee. Having considered the option you raised, Bob, and the other two options I pointed out, the government made the determination that this was a reasonable and responsible way to go. It thought there were difficulties with a pure right which, quite frankly, we had.

It was a decision that was not taken lightly; it was a decision taken after substantial discussion with my cabinet colleagues. The committee's will is obviously its own, but the option you put forward was not the option on which the government decided at the end of our discussions.

Mr. Chairman: Let us proceed. We are straying into the merits of the bill, rather than what is in the bill. That will come in clause-by-clause debate. Are there any other comments on subsection 40a(2)?

Mr. Taylor: Please correct me if I am wrong--this is my interpretation and I understand we are getting into policy if we question the interpretation--but as I understand subsection 40a(2), there is a discretion on the part of the board whether to

grant the arbitration route. In the cases enumerated, it is mandatory that there be arbitration. Is that the gist of this subsection?

Mr. Mackenzie is concerned that there may be a little crack in the door, that it may be open a little bit. Experience will tell how flexible it is or how wide the door is open. The gist of subsection 40a(2), as I read it, is that there is a fundamental discretion on the part of the board whether to effect arbitration on a first contract, except in most cases enumerated in clauses (a) to (d). If it falls within that ambit, the board has no discretion. Is it mandatory that there be arbitration?

Mr. Armstrong: No, that is not right. Let me go over it again. On receipt of the application, the task of a board in determining whether to grant arbitration is a discretion of the board. I argue that it would be unreviewable discretion unless they ask themselves the wrong question or commit an error of jurisdiction.

They have to make a threshold determination. First of all, is there an impasse? Are they satisfied that bargaining has been frustrated? Then they have to ask themselves, has that impasse or the frustration resulted from any of the matters enumerated in clauses (a) to (d)? They have to answer both questions in the affirmative in order to grant access to first-agreement arbitration. To answer your question specifically, there is no situation where the statute mandates them to give first-agreement arbitration.

Mr. Taylor: If the board finds, or it appears to the board, that collective bargaining has been frustrated because of any of the four reasons enumerated in clauses (a) to (d), then the board must arbitrate.

Mr. Armstrong: That is true.

Mr. Taylor: There is no discretion in that case. That is finding of fact, is it not?

Mr. Armstrong: Once the findings have been made, that is what the board must do.

Mr. Taylor: That is not discretionary. In my view, that is mandatory. If those facts are present it is mandatory.

Mr. Armstrong: If you are using that in that sense, once those findings are made, the board must direct first-agreement arbitration. It has no other alternative.

Mr. Chairman: It does say "shall."

Mr. Taylor: It says "shall," yes. That is mandatory. In the first part of that subsection, however, it strikes me that in general terms it is permissive. The board shall consider and make its decision within 30 days of receiving an application. That is permissive, as I read it, but with the finding of fact of

frustration because of the four enumerations, it is mandatory that there be arbitration.

Mr. Chairman: I agree with that. The word "appears" is not as definitive as the word "shall." That is a discretionary aspect of the subsection, is it not?

11:40 a.m.

Mr. Armstrong: The point I was getting at, so as not to mislead anybody, is that the board is assessing the nature and quality of the evidence. It is similar to a criminal case in court. If you find certain facts in a criminal case, you have to convict, but how the facts are viewed and how the evidence is weighed is up to the tribunal.

Let us take another example. There are administrative law cases that say, for example, that a court will not interfere with the tribunal's assessment of the facts unless the findings are so perverse, unless they ignore the facts, unless they find the facts to be so--let us say the evidence is clear that there is an impasse, bargaining has been frustrated and they ignore the evidence and say, "We disagree; we are not finding that." That would be a reviewable error.

I was saying that it is the tribunal that is assessing the evidence and in that sense it is not directed to do anything. Once it makes those findings--you are right on this--it has to direct settlement by first-agreement arbitration.

Mr. Haggerty: It is like hearing a discovery.

Mr. Taylor: Clause (d) is so broad that I surmise there would be arbitration in every case.

Mr. Armstrong: Clause (d) is broad, but to return to the point I made, I do not think it is open-ended. It is very broad and there will be arguments by some that it is indeed open-ended. I think it has to be read in the context of the whole section and there certainly has to be a finding of frustration. On the face of it, it is very broad.

Mr. Reville: I can think of one example where clause (d) probably would not lead to an automatic hearing. That would be where the board finds that it is the applicant that is the cause of the frustration. Surely, it would not be able to come with less than clean hands before the board and ask for this remedy. I agree with the deputy minister that the clause is not open-ended, but if there is a relevant reason I agree that it is mandated. Once you find frustration and a relevant reason for the frustration of the bargaining process, I think there is a mandate to hold a hearing.

Mr. Taylor: As long as it is not self-induced.

Mr. McGuigan: What would happen in a situation where a company says: "We cannot raise our wages. Our market is very narrow and we would go out of business"? It says in clause (b), "without reasonable justification." What if the company brings in

reasonable justification? It brings in the books and the evidence as to its position in the market, and it becomes evident the company cannot move without going out of business.

I can think of a case of a farm machinery manufacturer in my riding about five or six years ago. At the time, I think the workers were getting \$6 an hour, without a union. The union came in and I think it bumped the hourly wage up to about \$10. About two years later, the company was bankrupt. I know one of the labourers quite well because he lives near me and he is now working for \$5 an hour. Because of his age and category, even if another opportunity came along to get into a factory, he would be bypassed. That fellow will be at \$5 an hour for the rest of his life. What would happen if the board--we agree that the company cannot give any more money. What happens from that point on?

Mr. Armstrong: You are at the core of the debate and it is a very important question. You will appreciate that much will depend on how the board views the words. I have given my interpretation of the labour board's exclusive jurisdiction. Let me roll it back a bit and say that up to now, under the bad faith bargaining section, the board quite rightly has said: "We are not in the business of making economic judgements on the business rationale that is being advanced by the employer for taking a tough position. As long as it is based on business reasons then we are not going to hold it is bad faith bargaining."

I would argue that this section gets the board right into the question, in doing the screening, of making a determination as to whether the position of your hypothetical employer is or is not reasonable in the economic collective bargaining context. If the board were to determine that the case was valid and that the employer was advancing an economic argument that commended itself to the board, in that situation the board would not grant first-agreement arbitration on the theory that the employer ought not to have its faith put in the hands of a third party when it had a valid economic argument.

Mr. Taylor: It might, because it is discretionary. It becomes discretionary.

Mr. Armstrong: I was going to come to that. On the other hand, it might say: "We have listened to your argument. We have looked at your balance sheet and at your competition. We think there is no reason why you should not be subjected to third-party determination. The strike has gone on for X number of months and we are going to settle it for you, taking into account the economic arguments you have put forward."

Again, I do not want to stray into policy, but it is precisely for that reason that the proponents of nonautomatic access would say there ought to be a screening device so that a determination can be made as to whether the positions being advanced are legitimate and justifiable in a collective bargaining sense, and therefore that the economic argument should continue across the bargaining table and on the picket line.

Mr. Mackenzie: In the economic statement, the figures

should be readily available without question.

Hon. Mr. Wrye: I will stray. Presumably, and Jim uses the example, I think that a respondent who wished to avoid arbitration would want to put its best case, and its best case would obviously include coming in and throwing open its books to the board and saying: "Here is what we have been telling the trade unions. They want \$1 an hour. We lost money last year. If we have to go another \$1 an hour, we are out of business." None of us sitting around here knows what the board will say in that event. I acknowledge we do not know what the board will say.

Mr. McGuigan: I assume if they did come to that point the books would be open. In my view, they would have to be public to justify the case. Here you have a certified union and you have the board saying, "We do not think the company can give any further award." What is the next step?

Hon. Mr. Wrye: If the board says in any of these events, that or any other one, "We deny the application"--you may have other cases where the board will deny the application because not enough bargaining has gone on. There is any number of reasons why the board, for reasons of time or on the pure merits, may deny the application. Presumably the parties go back and continue to bargain collectively. If there is a strike or lockout in place, it continues and the parties continue to make their efforts to reach a collective agreement amongst themselves.

Using your scenario and your example, presumably that is what would happen. The board would say, "The nature of the bargaining by the company has been fairly uncompromising, but there has been a reasonable justification." Consequently, let us say it has been frustrated but not because of the respondent and--

Mr. McGuigan: The strike would go on then until one side or the other gave in. In the meantime, the operation cannot continue. You cannot hire alternate people.

Hon. Mr. Wrye: You can under our law. That is another matter.

Mr. McGuigan: Did you say "can" or "cannot"?

Hon. Mr. Wrye: Replacement workers continue to be allowed in the province.

Mr. Chairman: We are discussing the possibility of the second accord. Is there anything else, Mr. McGuigan?

Mr. McGuigan: No.

11:50 a.m.

Mr. Taylor: Following up on what Mr. McGuigan said, the board might very well look at that situation and say, "Yes, if the union insists on this type of wage settlement and the company looks through the books and all the economic facts it can muster, the company or the employer will go out of business." The board

might determine that, but the board still is in a position to send that to arbitration.

Hon. Mr. Wrye: Yes, but then if one leaps ahead, and I should not, I think that I am correct in anticipating--

Mr. Taylor: I am not saying that is bad because--

Hon. Mr. Wrye: If the board says, "None the less we are going to allow access," and it is not reviewable, the next shot, as it were, for the employer in this instance comes in subsection 40a(15), matters to be accepted or considered, which reads:

"In arbitrating the settlement...and account may be taken of...

"(c) such other matters as the board or board of arbitration considers relevant to a fair and reasonable settlement."

Presumably it would allow the company to plead its case. In essence, in this case the company is pleading poverty, but it will allow the company to plead poverty one more time.

Mr. Taylor: It can anyway. What I am saying is that it is not necessarily bad. If the board has faith in the arbitrator and says, "You have to have a third party come in here and mandate a settlement," perhaps that is the route to go to keep the company operating and the men employed. Maybe it is a judgement call with respect to the confidence the board has in the arbitrator.

Mr. McGuigan: I was not thinking of the Visa strikers. I am thinking of smaller companies who have picked out a little narrow niche in the market. I am familiar with the ones in farm machinery which make one or two products and have a little niche in the market, but it is a narrow niche. I was wondering how these companies would fare, but I am satisfied with your answers.

Mr. Armstrong: The 30-day period in subsection 40a(2) is a fast track. I do not want to assume what you will hear from others, but you may hear that 30 days is too fast or unrealistic. I suppose in anticipation of that the view of the ministry is that there is no more important application than one for first agreement arbitration, given the general purpose of the act. I think it is fair to say that the 30 days is an important issue.

Hon. Mr. Wrye: We debated the time of 30 days. I want to draw this particularly to the committee's attention. In my opening statement I referred to the times. If there is any one time frame we really wrestled with and that I am extremely open to hearing argument on it is this 30 days. I want to assure committee members that we debated other numbers extensively. My only request to you is that given the nature of these situations, the uncertainty and general unhappiness that you would have in any event and the fact that in many cases you will have workers on a picket line, people out on strike losing money, a company which may or may not be working, thus may be losing money, we want to get on with the issue of determination of access.

If the committee in its judgement does not think 30 days is realistic, I am quite prepared to consider changes. I only ask you to look at the fact that we want this matter on a fast track. If you think a fast track ought to be a figure other than 30 days--

Mr. Taylor: Could this be considered directory only?

Mr. Armstrong: I think the answer to that is, yes--I guess counsel is not here at the moment--because in the Police Act, for example, there is a provision for arbitration to be completed within 60 days. There is a fairly famous Court of Appeal decision which says arbitration is not nullified if it is missed and obtained on the 62nd day. In that sense, it was directory as opposed to mandatory. None the less, it gets people moving.

Mr. Taylor: What I am saying is there may be flexibility in there anyway.

Hon. Mr. Wrye: If you look at section 17, "the parties, by agreement, or the minister may extend any time limit set out in this section..." Having said that, quite frankly, if 30 days is too short and I have to extend all the access questions, I would have a concern. If members of the committee, after hearing from witnesses and debating amongst themselves, and we as a government, after listening to and reading the submissions, feel that a different figure is more appropriate, I am quite open to move to that.

There is no magic in the number arrived at other than that we tried to put it on as fast a track as reasonably possible. If the committee feels that we have not gone far enough or, more likely, that we have gone too far, I certainly am very open to consideration of a change.

Mr. Mackenzie: Has the minister received any representations on this? Both he and the deputy have raised it and it has been raised before. I do not know of any complaints about the time frame.

Hon. Mr. Wrye: I have heard some suggestions that we are being unrealistic in this one area, that the track may be too quick. The short answer is there is nobody desiring to move it to 80 days or anything like that. The line has been, "You are going to be extending most of these access things if you leave it." I do not know. I hope you will question witnesses. If the committee is satisfied with it at the end, we hope to be able to make it work.

Mr. Taylor: You get into a numbers game though. If it is a matter of procedure as opposed to substance, it is not a substantive matter. I do not know; you have to have a cut-off date.

Hon. Mr. Wrye: Yes, you do. It is a question, whether we have chosen a realistic cut-off date. I think we are dealing with whether the number is realistic. Ought it to be 35 or 40 days? If we get much beyond that, I would think we had not only chosen a different number but also had gotten off the fast track. This is the one thing I do not want to do.

Mr. Taylor: You are extending it to 40 days instead of to 30 days. It is still a matter of directory only. It is a matter of procedure as opposed to substance.

Mr. McGuigan: Probably the lawyers on our committee would be best able to answer this question. I assume there is a limited number of labour lawyers and arbitrators. Also, they are probably working on more than one case. They cannot make a living doing one case a month or something. They have to juggle their time from this case to that case, depending on the time the board allows them.

Will the 30-day time frame make that unworkable as far as they are concerned? Will they need a few more days for more flexibility? Will it make any difference in the business of going from one case to another?

12 noon

Hon. Mr. Wrye: I remind you again that we could have a situation where the application comes in even as the workers are out on a picket line and/or where the company is not doing business, perhaps getting itself into economic difficulty. Given the sensitive nature of these cases, we think it is important and critical that the application is heard in a timely manner. We would assume those who appear on behalf of companies and unions will understand their obligation to clear the decks and have the hearing.

I would like to share my frustration. Once you get into this slippery slope of saying, "The lawyers want to adjourn until two weeks from Thursday," there is some evidence that there is no end to it. The government believes, in bringing forward this legislation, that it has to be done in a timely fashion.

Mr. McGuigan: I agree with that.

Hon. Mr. Wrye: Who is this legislation for? It is for employers and employees. That is what it is all about. They are the ones who will be directly affected by it. With respect, the lawyers will have to fit their schedules to meet the importance that both employer and employee have in this legislation.

I have talked to some labour lawyers who have seen the bill. I have had an opportunity to meet with them informally. They raised a small concern about the 30-day time frame, but--as I said to Bob Mackenzie--it has been a concern about whether 30 days is too short for the complexity of some applications.

A concern from the bar has not been put to me, but I do not know if the deputy has heard anything. The bar did not say, "We will not be able to schedule this." I think they understand their obligation to clear the decks and to clear their schedules.

Mr. Haggerty: I have no difficulty accepting the 30 days laid out in the bill. It allows both parties to reconsider their positions before going to arbitration. With good faith bargaining,

as long as the two parties have that 30 days to work, they may come up with an agreement acceptable to both parties.

In the civil courts, a lawyer can say: "My schedule is not ready for this hearing within the 30 days. I want to defer it for another 30 days." You will get a backlog under the Labour Relations Act, the same as in the civil courts. By having a definite 30 days in the clause, the parties will have to look for that final settlement.

Mr. Chairman: Can we move on? We shall have time to debate the bill at the end of the hearings during clause-by-clause debate. This is a gentle reminder.

Mr. Armstrong: Subsection 40a(3) is the presumption in favour of an arbitration board. As you will see, it provides that where the labour board makes a positive direction, the matter is to go to first-agreement arbitration. It will be a board of arbitration hearing unless, within seven days of giving the direction, the parties notify the board they want the labour board itself to hear the case.

Mr. Haggerty: Will there be any program within your ministry to catalogue all the decisions so they will be readily available to parties involved in labour negotiations?

Mr. Armstrong: Do you mean a decision on whether to issue a direction?

Mr. Haggerty: Yes, when a direction comes down, will it be catalogued?

Mr. Armstrong: All the labour board decisions are reported on a monthly basis in the labour board monthly reports. They are available in a timely fashion.

Mr. Haggerty: Will that continue?

Mr. Armstrong: Yes, that will continue. They are available to the parties even before the monthly reports are published. But they are publicly available and broadly distributed in the monthly reports. That will apply to these decisions as well.

Mr. Mackenzie: I am not sure if this is the place to raise the question. Where the board would be handling the settlement, how are we going to deal with the delays in the current situation at the board and take on this new responsibility as well?

Hon. Mr. Wrye: That matter has been raised in the past in a number of cases. In general, I as minister feel no compunction in pointing out to my colleagues in a very real way the impact of new government initiatives as far as manpower is concerned. It is fair to say there is a sensitivity on the part of the government. There is a manpower impact that will be felt through this legislation, and we will be attempting to deal with that matter.

You are as aware of and sensitive to the backlog of the board as I am, and we obviously do not want this legislation to make it worse.

Mr. Mackenzie: The point is, and I think it is fundamental, the reason I am surprised that anyone would object to the 30 days we discussed a few minutes ago, is we are in a situation with probably the most difficult, the nastiest and most destructive of labour relations situations in many of the first contract disputes. If we should have them going to the board in view of the current delays--we have some cases a couple of years old, as you know, not that these cases would be necessarily in that category--it boggles my mind.

Mr. Armstrong: Subsection 40a(4) deals with the situation where the arbitration is done by the board; that is, where the parties elect to request the board to do it. It provides in essence that the board is required to appoint a date for a hearing, to commence the hearing within 21 days of the giving of notice and to issue its decision on the first agreement within 45 days of the commencement of the hearing.

Ms. E. J. Smith: I have a question because it is my first go-through on labour negotiations. In the circumstance of two sides having agreed on arbitrators and the first thing the arbitrators do is decide to turn it back to the board, would that be usual or extremely unusual?

Mr. Armstrong: It is in the hands of the parties. Going back to subsection 40a(3), the scheme of the act is the presumption that the parties will have it done by private board of arbitration--we will get to the method of selecting that in a moment--unless they jointly request the labour board to do it. It is entirely within their control.

Ms. E. J. Smith: Then I misunderstood it. Would these be the two parties that labour and management themselves select to go to the board?

Mr. Armstrong: That is exactly right.

Mr. Haggerty: I want to follow up on that question with regard to this section. I presume no lockout or strike is permitted in that time, because we are looking at 65 or 70 days to go through this whole scenario.

Hon. Mr. Wrye: That is another section of the act. There is no strike or lockout permitted and it ends one that is ongoing.

Mr. Armstrong: That is subsection 40a(11).

Hon. Mr. Wrye: Yes, if you want to read ahead.

12:10 p.m.

Mr. Chairman: Before we move on any further, we are going to be missing one of the caucuses entirely within five minutes. Is it appropriate that we adjourn at 12:15 instead of

12:30? Are there any problems with that? We will not finish anyway by 12:30. Will we come back again at 2 p.m? Okay. Let us go ahead until 12:15

Anything else on subsection 40a(4)? Okay.

Mr. Armstrong: Subsection 40a(5) is the private arbitration situation, the one contemplated by subsection 40a(3) unless the parties elect otherwise. It sets time limits for the construction of the board of arbitration.

Within 10 days of the giving of the direction by the board, each party informs the other of the name of its appointee to the board of arbitration. It is a three-person board. The selected appointees, within five days of the appointment of the second of them, appoint the chairman.

It may be useful to do subsections 5 and 6 together.

Mr. Chairman: Sure.

Mr. Armstrong: Subsection 40a(6) provides that if a party fails to make an appointment as required by subsection 5--that is, if the parties have failed to appoint their nominees or the nominees fail to agree on a chairman--the appointment of either the nominee or the chairman is made by the minister on the request of either party.

Mr. Chairman: Do they make their own choice of chairman, if they can agree?

Mr. Armstrong: Yes. If they cannot agree, the minister will do it for them.

Mr. Haggerty: When you are dealing with this private arbitration, you are going to get into an area that could be costly to both parties and even to the Ministry of Labour itself.

For example, I think of the Ontario Municipal Board. If any person goes before it, there is usually a charge or a fee that is initiated right from the beginning to stop any frivolous complaints or grievances or whatever it may be that the two parties cannot agree to.

Is there any possibility that we should be looking at that here? Somewhere along the line, the user has to pay.

Hon. Mr. Wrye: They are going to pay. If you read ahead to subsection 8, in private arbitration they pay for their own nominee and then they pay one half of the cost of the chairman.

Mr. Haggerty: Do you know what cost would be involved in that?

Hon. Mr. Wrye: The parties split the cost of the chairman. The cost will vary from arbitration to arbitration, depending upon its complexity and the amount of time involved.

Mr. Haggerty: There is no set fee, though; a bottom base line for it.

Mr. Armstrong: No, but there is a private market out there that is operating with a vengeance.

Hon. Mr. Wrye: I could lose half of my staff.

Mr. Armstrong: That is right. I do not want to put figures on the record. Mr. Pathe, you are the expert on that.

Mr. Haggerty: Give us an idea of what we are looking at.

Mr. Pathe: The last I heard, for a one-day hearing and the writing of the award, arbitrators are charging anywhere from \$800 at the low end to--

Mr. Haggerty: That is not per hour we are talking about, is it?

Mr. Pathe: No, that is for the day and the writing of the award. It could be anywhere from \$800, for some of the arbitrators who came into the system more recently, up to about \$1,500 or \$1,600 for some of the mainstream arbitrators who are being hired.

Mr. Mackenzie: I think \$1,200 to \$1,500 per day is much more on stream.

Mr. Pathe: That is the range. I agree that \$1,200 to \$1,500 is reasonable.

Mr. Haggerty: I have not really looked at subsection 8.

Mr. McGuigan: Neither have I.

Mr. Haggerty: I am thinking of the land compensation board, for example. It may be charged to one party who may have to absorb all the cost. I am looking at some way of discouraging them from getting to this level. They should sit down somewhere and agree before that. The cost factor might be something.

Hon. Mr. Wrye: We looked at that. There was some discussion, but we opted not to do it.

Mr. Mackenzie: It is an ongoing argument, Mr. Haggerty.

Mr. Haggerty: I know that.

Mr. Chairman: Anything else on subsections 5 or 6?

Mr. Armstrong: Subsection 40a(7) is sort of a standard clause when you have boards of arbitration; it is standard in one sense but not in another.

The first part is fairly innocuous. It says the board of arbitration shall determine its own procedure but shall give full

opportunity to the parties to present their evidence and make their submissions.

Section 108 applies to the board of arbitration and its decisions and proceedings as if it were the labour relations board. That refers to what is called a privative clause. Section 108 of the act says that, in effect, the decisions of the labour relations board are not subject to appeal or review by the courts. That is what it says. Legally, it means you cannot go to court except on an application for a judicial review--this is a gross oversimplification--and then you can go only when, in this case, the board of arbitration commits an error of law on the face of the record or exceeds its jurisdiction. It is a very limited form of appeal. Legislative counsel may have a more coherent description of that than I do.

Mr. Revell: I do not think it can be said any more succinctly. The operation of sections such as 108 is an attempt to limit intervention by the courts in the decisions of administrative tribunals and panels.

Mr. Mackenzie: Can the deputy or minister give us any indication of what is happening with respect to requests for judicial review?

Mr. Armstrong: We can probably give you some statistics on this before your hearings get too much further along. Bear in mind that there is no privative clause in rights arbitrations. Is there a privative clause under the Hospital Labour Disputes Arbitration Act?

Mr. Pathe: I do not think so.

Mr. Armstrong: My impression is that there is more and more access to the court in rights arbitrations. We do not think that is a healthy trend. That is why we thought there should be a privative clause. We will get some figures for you.

Mr. Chairman: Let us complete subsection 40a(7) when we return at 2 p.m.

The committee recessed at 12:20 p.m.

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Publications

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STANDING COMMITTEE ON RESOURCES DEVELOPMENT
LABOUR RELATIONS AMENDMENT ACT
TUESDAY, FEBRUARY 25, 1986
Afternoon Sitting



STANDING COMMITTEE ON RESOURCES DEVELOPMENT

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Haggerty, R. (Erie L) for Mr. Callahan

Johnson, J. M. (Wellington-Dufferin-Peel PC) for Mr. Pierce

Lane, J. G. (Algoma-Manitoulin PC) for Mr. Stevenson

Also taking part:

Wrye, Hon. W. M., Minister of Labour (Windsor-Sandwich L)

Clerk: Decker, T.

Staff:

Revell, D. L., Legislative Counsel

Witnesses:

From the Ministry of Labour:

Armstrong, T. E., Deputy Minister

Pathe, L. V., Assistant Deputy Minister, Industrial Relations
Division

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Tuesday, February 25, 1986

The committee resumed at 2:18 p.m. in room 228.

LABOUR RELATIONS AMENDMENT ACT
(continued)

Resuming consideration of Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: Are there any objections to beginning before the minister gets here? Mr. Armstrong and Mr. Pathe can take us through the sections of the bill. I have to leave at 2:30 p.m. but Mr. Ramsay will look after things for the rest of the day.

Let us commence. When we adjourned before noon we were on subsection 40a(7). Are there any further questions or comments on on that? Mr. Haggerty.

Mr. Haggerty: If I can find my place. I am looking for the section of the act on which the legislative counsel made comments. There was quite a bit of Latin terminology in that section, everything but de novo. I was wondering just what it meant.

Mr. Revell: Section 108 of the act?

Mr. Haggerty: I do not know where we left off.

Mr. Chairman: An amendment to purge all that from the act would be in order.

Mr. Revell: We are getting there.

Mr. Haggerty: Yes, that is the right section, "Board's orders not subject to review." Can we have the meaning of that in English? In layman's terms. Let me put it that way. Even lawyers get confused with terms like quo warranto. Let us have an explanation of that section.

Mr. Revell: The section provides that the courts are not to review any decision of the board for any reason. There are a number of ways things can be brought before a court for review. In the list that is set out here, "injunction, declaratory judgement, certiorari, mandamus, prohibition, quo warranto," you will notice there is then an "or otherwise."

Mr. Haggerty: You have covered everything. That is like miscellaneous.

Mr. Revell: Yes. This predates me by a long time. Not being a courtroom lawyer, I am not altogether familiar with all these remedies.

An injunction is where somebody comes forward and asks for an injunction that something be done or not be done. A declaratory judgement is a judgement where you are seeking no monetary damages per se but you are asking the court to give you a declaration that this is your right or that the other person is in the wrong for whatever reason. I must admit I am not sure what certiorari is. I have not dealt with this aspect of litigation in a long time.

Mr. Haggerty: Is there any violation under the Charter of Rights in it?

Mr. Mackenzie: I would like to know what it is too.

Mr. Chairman: Mr. Mackenzie might be able to help us out here.

Mr. Armstrong: Actually, it is so old that I know what it is. It has been subsumed now under the Judicial Review Procedure Act. Certiorari is a motion to quash.

2:20 p.m.

Mr. Mackenzie: Why the hell does it not say a motion to quash?

Mr. Haggerty: Why do you not put it in there so it is understandable?

Mr. Revell: One of the reasons I am not familiar with this terminology is that most of it predates the Statutory Powers Procedure Act and the Judicial Review Procedure Act. While these remedies are still known to the law, the terminology is not used much any more.

Interjection: It is simply called an application for judicial review.

Mr. Revell: I should be more familiar with the old law, but I like to think of myself as being so young.

Mr. Haggerty: Mr. Chairman, I see I should not have raised that question.

Mr. Chairman: Ray, you should know better.

Ms. E. J. Smith: You are too young to understand, Ray.

Mr. Chairman: Are there any other learned questions on subsection 7?

Mr. Haggerty: We cannot get any learned answers.

Mr. Mackenzie: I would like to make it clear, Mr. Chairman, that it is not a learned question, but I did not hear an explanation for mandamus. I have heard that term often enough that I probably should know it.

Mr. Armstrong: Mandamus is an order requiring somebody

to do something as opposed to an order to quash. It is a positive order requiring a body to take certain action that it has previously refused to take.

Mr. Chairman: We finally got an answer as learned as the question. Anything else on subsection 7? Can we move on to subsection 8?

Mr. Armstrong: We touched on subsection 8. The minister spoke to that. It deals with the expenses of the board of arbitration. The minister pointed out that each party has to pay the remuneration expenses of its own appointee and half the remuneration expenses of the chairman. That is fairly standard.

Mr. Mackenzie: Is there any challenge possible to that? Could a firm refuse to pay its share? I guess if they are the successor they could not.

Mr. Armstrong: It is a positive duty and technically speaking, failure to comply with it would be a statutory offence.

Mr. Chairman: A mandamus almost.

Mr. Armstrong: Do you want to speak to the enforcement mechanism?

Mr. Revell: With respect to this, there is no enforcement mechanism in the act and it may be something that we should be reviewing with ministry counsel during the next few weeks while this is at public hearing. Normally, where you have a statutory duty the remedy is not a contractual right to recover. It is a fine or whatever other remedies are specifically provided in the act.

Mr. Mackenzie: Am I reading you right in saying that the answer to my question could be yes? They could refuse to pay their share?

Mr. Revell: I am saying that could be the answer, and it is something I will have to review with ministry counsel in the next several weeks.

Mr. Armstrong: There are a number of compulsory arbitration statutes, the Hospital Labour Disputes Arbitration Act, the Police Act, the Fire Departments Act. The government pays for some of those, for example, the Hospital Labour Disputes Arbitration Act. It may be the same for the Police Act.

Mr. Pathe: Certainly the hospital act and the Crown Employees Collective Bargaining Act.

Hon. Mr. Wrye: We will take a look at that.

Mr. Taylor: This kind of a provision is not unusual, is it? There is no wrong without a remedy.

Mr. Pathe: It is to be found in most collective agreements.

Mr. Taylor: Does this pose a problem? I do not think it poses any problem. I suppose technically you could convict for breach of the statute. Then you could bring a civil action to recover your money.

Mr. Armstrong: Yes, it is about that way. I would be surprised if you wanted to go further and provide remedies.

Mr. Revell: The way it is drafted at present is not dissimilar to what you would find in subsection 44(5) on page 19 of the office consolidation.

Mr. Mackenzie: It depends on whether you dealing with an Automotive Hardware or an Irwin Toy.

Mr. Revell: As far as I know, collecting on these arbitrations has not been a problem during the good many years this act has been in force.

Mr. Chairman: Anything else on subsection 8? Subsection 9.

Mr. Armstrong: In subsection 9 the time limit set out for the board of arbitration is equivalent to the provisions in subsection 4 for the Ontario Labour Relations Board.

Mr. Revell: May I jump in at this point? I believe this is where one of the amendments handed out this morning starts. The present subsection 9 will be replaced by the first amendment in the set I have.

Mr. Armstrong: Mr. Revell, why not go ahead? You redrafted this and you can tell us the scheme.

Mr. Revell: Because of the nature of the arbitration that is going to occur in this act, it was felt that the provisions we had in the bill were not quite adequate to deal with a number of issues, such as the powers of the arbitrators and what would happen in the event that somebody resigned from the arbitration board. The first thing we are going to do, therefore, is eliminate the existing subsection 9 and replace it with the four subsections on the first page of the amendments that were handed out this morning.

The first subsection lists several subsections of the Hospital Labour Disputes Arbitration Act which will be incorporated by reference into this act. The reason we did not set out the provisions all over again is that it is a little bit like reinventing the wheel. We did not feel it was necessary to say of all this, but over the lunch hour the clerk had the relevant section of the Hospital Labour Disputes Arbitration Act Xeroxed so members will know what we are talking about.

The provisions we are incorporating by reference are subsections 6(8), (9), (10), (12), (13), (14), (17) and (18). Subsections 8, 9 and 10 deal with the replacement of members or the filling of vacancies where there is a resignation or death or other similar problem. Subsection 12 says that no person shall be

appointed a member of a board of arbitration who has a pecuniary interest in the matter being arbitrated. I submit this is a logical and fair disqualification. Whether such a person could sit on a board of arbitration is probably a question for common law.

Subsection 13 requires that the chairman of a board is responsible for fixing the time and place of hearings, subsection 14 deals with what happens when a member fails to attend and subsection 17 deals with giving the chairman a second or deciding vote. That involves not only procedural matters but the actual decision of the board. There are two levels where the chairman has a casting vote. One is in deciding procedural questions and the other is in making the final decision. That pretty well covers the matters that have been carried forward from the Hospital Labour Disputes Arbitration Act.

2:30 p.m.

In drafting these sections, I was instructed by the ministry to bear in mind that once the arbitration starts, it is compulsory arbitration and under the Hospital Labour Disputes Arbitration Act, we are dealing with arbitration panels that have very much the same kinds of powers, so we have set them up to be parallel as nearly as possible.

The next thing we did in subsection 9 is incorporate by reference two subsections from section 44 of the Labour Relations Act, which you have in front of you. They are set out at pages 19 and 20 of the office consolidation which was distributed this morning.

The first one is subsection 44(8), which is set out in this act and relates to grievance arbitrations. We are going to give first-contract arbitrators the same power to summon and enforce attendance of witnesses, administer oaths, accept evidence under oath and make investigations.

The other one, subsection 44(10), deals with the effect of the arbitrators' decision. We wanted to make it abundantly clear that once the arbitration decision has been made, it is going to be binding on the parties. That is what the incorporation by reference does in this particular circumstance.

Since that deals with subsection 9, perhaps this is a good point to stop and ask if there are any questions.

Mr. Mackenzie: You have lost me somewhere along the way. That is my problem.

Hon. Mr. Wrye: Let me start with a question then. The Labour Relations Act is technically the major act. Is it normal to have what seems to be fairly substantive reference to another act? You talked about not reinventing the wheel in the Labour Relations Act. Is it normal to deal with this kind of an amendment in this way?

Mr. Revell: It is not at all uncommon. There are many situations where this has been done and I think this is an

appropriate case. In fact, on sober second thought, there are some other provisions in here that could have been included in this list. There are a number of common or very close to common provisions in section 6 of the Hospital Labour Disputes Arbitration Act and in section 40a of the bill that could have been just set out in this way, but were not.

Once we decide to incorporate by reference, I see nothing wrong with this device. It is used quite often. I do not think the people who will be dealing at this level are going to be fooled. My own rule in drafting is that where the statute and its provisions are of importance to the general public, I like to restate them. Here we are dealing with the internal operations of the arbitration panel. It is not going to be something that is a technical matter of filling vacancies and so on.

Hon. Mr. Wrye: These are specialist clauses.

Mr. Revell: They are specialist clauses, and I do not think it hurts to have them set out in a separate act.

Mr. Mackenzie: So I can try to understand this fully, could you walk me through it slowly? What you are saying is that subsections 40a(9) and (10) of the bill as we have it will be struck out--

Mr. Revell: They will be struck out at the appropriate time.

Mr. Mackenzie: --and we will include subsections 6(8), (9) and (10) of the Hospital Labour Disputes Arbitration Act. What about subsection 6(11)?

Mr. Revell: I have to refresh my memory as to what subsection 6(11) does. It only deals with a single arbitrator and, therefore, is not relevant for our purposes.

Mr. Mackenzie: Then subsections 6(12), (13), (14), (17) and (18).

Mr. Revell: Yes. If you are asking why subsections 15 and 16 are left out, subsection 15 is left out because it deals with an order to expedite hearings. It does not seem relevant here. Hearings are to be held under time limits anyway, and strict time limits are set out in the bill.

Subsection 16 has been captured with a slight wrinkle on it, and that is the one we discussed earlier this morning, subsection 7. Then we picked up subsections 17 and 18. Subsection 19 was not relevant to our purposes because it would be silly to take you from the Labour Relations Act over to the Hospital Labour Disputes Arbitration Act, only to find a reference that sends you right back to the Labour Relations Act.

I picked up the relevant provisions, or at least the ones we consider to be the relevant provisions; that is, subsections 44(8)

and 44(10) of the the Labour Relations Act, power to summon witnesses, etc.

Mr. Mackenzie: Following subsection 18 are subsections 44(8) and 44(10).

Mr. Revell: Subsections 44(8) and 44(10) of the Labour Relations Act. As I say, they deal with the power to summon witnesses, hear evidence under oath, administer oaths, enter premises or appoint people to carry out some of these functions on behalf of the arbitration panel. That is all under subsection 44(8). Subsection 44(10) deals with the effect of the decision once it has been rendered; that is, it is binding on all these particular parties.

Mr. Mackenzie: What are subsections 10, 10a and 10b?

Mr. Revell: Subsection 10 is a reworking of the present clause 9(a). Under the Hospital Labour Disputes Arbitration Act provisions, it is the chairman who sets the date. We want to make sure the date that is set is within this 21-day time frame. This parallels the fact that if the board hears an arbitration, it has 21 days to have its first meeting. The same 21-day rule will apply to a board of arbitration appointed under section 40a.

Incidentally, after this bill has been passed in committee, we will eventually renumber these sections so they go through in the proper sequence, but at this stage it is much easier to give them tags such as 10a and 10b.

Subsection 10a is the replacement of the present clause 9(b) on the bottom of page 2 and the top of page 3 of the bill. Subsection 10b is the present subsection 10, and it is exactly word for word; at least I hope it is. Actually, we have added something to it. I did not mean to mislead you. We just want to make it abundantly clear that the minister can appoint the mediator and it is to be before the board itself or the board of arbitration, as the case may be, commences its hearings.

The present subsection 10 makes a rather loose internal reference to subsections 4 and 9. We thought it would be clear if we spelled it out in words, rather than used the internal references.

2:40 p.m.

Hon. Mr. Wrye: There is another point. I take you back to subsections 10 and 10a. The 21- and 45-day figures are consistent with what we have if you go the labour board route, which is subsections 4 or 5. We are using the same commence a hearing within 21 days and bring down the arbitration award 45 days after the commencement of the hearing. If one goes the private arbitration route, there is a little delay over going the board route simply because one has to give notice and then name the parties. However, once the parties are in place, including the chairman, the clock starts running for both at the same time. The hearing has to begin 21 days later, and 45 days after it begins it

has to be over and the arbitration award handed down. The two routes or two paths are consistent in that regard.

Mr. Haggerty: I would like some clarification with respect to subsections 40a(9) and (10). Subsections 6(8), (9) and (10) relate to the Hospital Labour Disputes Arbitration Act. It goes on to say "subsections 44(8) and (10) of this act." In the drafting of the bill, if you look at the note at the side, the Revised Statutes of Ontario 1980, chapter 205, may relate to the Hospital Labour Disputes Arbitration Act, but with respect to subsections 44(8) and (10), should it not be the Labour Relations Act, chapter 228, or something such as that? There may be one clause that looks back at subsection 44(8) of the Hospital Labour Disputes Arbitration Act; I do not know.

Mr. Revell: The side note is a reference so that people who are looking for the appropriate chapter in the Revised Statutes of Ontario can find it handily. When we say "subsections 44(8) and (10) of this act," there is no reason to put it in the side note, because you are already inside the Labour Relations Act. That is the purpose of that. This is pretty standard drafting with respect to this sort of thing and it has worked fairly successfully for a long time.

Mr. Haggerty: The problem is if some average person were to pick it up, you make reference back to chapter so-and-so of the Hospital Labour Disputes Arbitration Act and then you jump over to the next one. A lot of it is time-wasting, which is the point I am trying to make. I like the American legislation. When they put it down, it is all in sequence so you can follow right through. You know from beginning to end what the interpretation of the act is. They do not make reference back to four or five other catalogues of some nature. Sometimes things can be missed in the proper and true interpretation of the act.

Interjection.

Mr. Haggerty: If we did something like that, we would not need lawyers.

Mr. Taylor: I notice you made a change here. You have "with necessary modifications" instead of the customary phrase "mutatis mutandis."

Mr. Revell: We were asked to remove the Latin just a half an hour ago and I did. We have been removing the Latin from the statutes on a--

Hon. Mr. Wrye: Not enough.

Mr. Taylor: You are removing the derivation of many fine words in the English language.

The Vice-Chairman: Is everybody satisfied with the explanation for subsection 9?

Hon. Mr. Wrye: Mr. Taylor would prefer the Latin, but he will waive it.

The Vice-Chairman: It seems so. Will we continue?

Mr. Taylor: I will not argue that point. I am mellowing in my old age.

Mr. Armstrong: That brings us to subsection 40a(11), which, as the marginal note indicates, is the effect of a direction by the board for first hearing arbitration on strikes or lockouts.

There are two situations. The first is captured in the first three lines, and that is once a direction is given, notwithstanding the other provisions of the act, there is a prohibition against both strikes and lockouts. The second situation in the rest of the paragraph is that where a strike or lockout is in progress and a direction is made, the strike or lockout is, by the statute, brought to an end. An obligation then arises on the part of the employer to reinstate the employees in a bargaining unit.

Clauses (a) and (b) set out the particulars of how that is to be done. If the parties are in agreement on the scheme of reinstatement, then that agreement prevails. If there is no agreement, then the reinstatement of the striking or locked-out employees is on the basis of their length of service among themselves. There is an exception to that and the labour board can direct a recall out of seniority, if it is necessary, to allow the employer to resume normal operations. Those would be the special requirements of the startup procedure.

Mr. Mackenzie: I take it that is restricted to a startup procedure.

Mr. Armstrong: That is the intention of the language; for the purpose of allowing the employer to resume normal operations. I suppose the startup period might vary.

Mr. Pathe: It depends on the kind of operation.

Mr. Mackenzie: It would also depend on the employer's interpretation of who he needs for a startup.

Ms. E. J. Smith: The board's interpretation of the employer's interpretation.

Mr. Mackenzie: In most cases the board would discuss it with the employer. The expertise is not necessarily with the board as to who is needed.

Ms. E. J. Smith: The way it reads, "except as may be directed by an order of the board made for the purpose of," so the board would rule on the employer's request in my interpretation.

Hon. Mr. Wrye: What you are hearing is certainly our intent. If the committee does not feel the wording captures the

intent, we are always open to wording that will be more explicit. I think it is very explicit in this case and I am quite satisfied that we have caught the only way out for an employer in terms of recall. In Hamilton they have to fire up the furnaces after a labour dispute and you know seniority does not always exactly prevail. It seems to me that is exactly our intent. It will be seniority unless you have to get some part of the operation geared up with specialist workers.

Mr. Mackenzie: In my mind specifically are Irwin Toy Ltd. and Radio Shack where there was a determination that certain people would not come back, period. It took long and lengthy arguments.

Hon. Mr. Wrye: I think that was a different situation.

Mr. Mackenzie: Concerning production facilities, probably the most qualified people were among those who were being discriminated against.

Hon. Mr. Wrye: We can look at it and see what else is there, but with respect, the spelling out is crystal clear.

Mr. Mackenzie: At the moment I am only signalling something.

Hon. Mr. Wrye: The board makes the determination. I am sure that if any fooling around is done by an employer on a startup, the union is there to object and say: "Hold on a minute. You are cherry picking. You are trying to take out the leadership."

Mr. Mackenzie: You will recall that for a while they could not get any of the union people back at Irwin Toy.

Hon. Mr. Wrye: I would certainly be disappointed and the government would not only be disappointed but would also wish to take additional action if employers tried to frustrate the intent of that. If a member of this committee wishes to tighten up the language in any way, we will look at it.

Mr. Taylor: We are not draftsmen. I think it manifests the intention we have expressed and if there are better legal draftsmen than the one who drafted this, fine, go to it, but I do not see any problem.

Hon. Mr. Wrye: I think the wording is very good.

Ms. E. J. Smith: It seems clear to me.

Mr. Armstrong: Subsection 12 continues the concept of reinstatement and makes two points. The first is that the obligation to reinstate in accordance with length of service applies notwithstanding the fact that there may have been replacement employees during the period of the strike or lockout.

2:50 p.m.

The second point is that the requirement to re*instate does

not apply where there has been a "permanent discontinuance of all or part of the business of the employer [and] the employer no longer has persons engaged in performing work of the same or a similar nature to work which the employee performed before the strike or lockout."

I do not know what I can add to that except to say on the latter point it sometimes occurs that there is, as a result of a strike or lockout, a diminution in the size of the operation and this simply requires staffing up to the extent required to perform whatever is left of the operation.

Mr. Mackenzie: For the sake of argument and question, what happens in an operation where production ends and warehousing or straight assembly continues after a dispute? People have been brought in to replace the workers out on a legal strike, and because there is no longer an actual production facility, the 10 people who were on that production line, for the sake of argument, are no longer required, but there are 10 or maybe six if it is a lesser work force in on the warehousing or assembly that now is being brought in from some other source.

Hon. Mr. Wrye: What you are suggesting is that one part of the operation ceases and the other part grows.

Mr. Mackenzie: It could even be less, but a different operation. As has happened in some cases, there was an actual production facility, but now there is nothing but an assembly or warehousing operation. The operation of the production workers who have been out is no longer there. There may be more or there may be considerably less in the assembly or the warehousing that is being done by some of those who replaced the workers during the course of a strike. Who is called back?

Mr. Pathe: In those examples, would it not be caught by the portion that says, "has persons engaged in performing work of the same or a similar nature"? Unless they were pretty highly skilled jobs, surely you would have them in the example you cite where assembly jobs had been eliminated and warehouse jobs created.

Mr. Mackenzie: Is there no question that is the intent as far as the minister is concerned?

Hon. Mr. Wrye: I would think so. Mr. Revell, do you think Mr. Mackenzie's example is caught by that?

Mr. Mackenzie: There could be two different classifications and job rates and all the rest of it.

Mr. Revell: Under this section, I do not think the employer is going to be allowed to change the job rates. I assume changing job rates is fairly constant with using replacement workers. I do not think that would be much of an argument. I agree with Mr. Pathe that if the work is not the same, you are going to be able to use the second branch of the test, which is work of a similar nature. If you change from first input to the day it goes out the door, to merely assembling things that are brought in from

somewhere else, presumably you still have an assembly line of some sort and a similar work test will take over.

Mr. Taylor: I do not know how you can define that in advance of the specifics because you are talking about assembly in lieu of manufacturing. Assembly may be defined as manufacturing in some sense, say for federal taxation. If you are into straight warehousing, that may be something else.

Mr. Mackenzie: I probably could have given a better example. I am just laying it out as a case scenario as to whether an employer decides he is going to get rid of the people who have been his problem in organizing, and attempts to see that they are not called back and others are left there. We have had all kinds of cases of that and most of the bitter first-contract disputes. That is why I am raising it.

Hon. Mr. Wrye: I was just conferring with my officials. It had already crossed my mind that the capability of the worker may be called in question. You raise a good point and we will take a look at it.

Mr. Taylor: The reason I commented was I did not want the members of the committee--I am more concerned with my own comfort than yours--to be lulled into a sense of false security or assumption when that was not entirely present.

Hon. Mr. Wrye: I think you are right. The warning light has already gone on. We will take a look at that.

The Vice-Chairman: Any other discussion on that subject? Go ahead, Mr. Armstrong, to subsection 40a(13).

Mr. Armstrong: Subsection 40a(13) is popularly referred to as the "freeze provision."

Let me just go for a moment to section 79 of the act itself. As members know, when notice to bargain is given under section 14 of the act in the case of an initial certification, or under section 53 in the case of a renewal, the employer is from that point forward prohibited from altering the terms and basis of employment and rights of wages and so on without the consent of the trade union.

Subsection 40a(13) does the same thing in two situations. First, where the direction by the board to have a first-agreement arbitration is given under subsection 40a(2), in that case the freeze occurs.

The other situation is where the dispute has been in effect, the conditions have been altered and the direction is then given to go to first-agreement arbitration. The subsection requires the employer to restore the situation that existed prior to the change having been made. The freeze operates until the first collective agreement is settled.

Mr. Pathe: Subject to subsection 40a(14).

Mr. Armstrong: Yes, subject to subsection 40a(14), which probably should be dealt with at the same time. That simply entitles the employer and the trade union to waive the freeze and alter the rates of wages or any other term or condition of employment, notwithstanding subsection 40a(13).

The Vice-Chairman: Any discussion or questions on this subsection? If not, I guess we continue.

Mr. Armstrong: Subsection 40a(15) deals with criteria to be taken into effect by the tribunal arbitrating, be it the Ontario Labour Relations Board or a board of arbitration.

The first point is that the tribunal seized of a matter shall accept any matters agreed to by the parties prior to the issues coming before it. In the arbitration of the remainder, the subsection stipulates that certain matters shall be taken account of, the first one being "whether the parties have made reasonable efforts to reach a collective agreement," the implication being that it should be prior to the issue coming before the tribunal.

The second criterion is "the terms and conditions of employment, if any, negotiated through collective bargaining for employees performing the same or similar functions in the same or similar circumstances as the employees in the bargaining unit." There is a final basket clause: "such other matters as the board or board of arbitration considers relevant to a fair and reasonable settlement."

The Vice-Chairman: Any discussion or questions? If there are none, we will continue.

3 p.m.

Mr. Armstrong: Subsection 40a(16) is amended. You have the amendment before you. In its original form it provided that the collective agreement settled under the first-agreement arbitration was to be for a period of two years from the date on which it was settled, and that provision remains the same.

The second part originally provided for retroactivity of any of the provisions of the settled agreement to such date as may be determined by the tribunal. The amendment puts a limitation on retroactivity. It really does two things. It provides that the term of the agreement's operation shall not be subject to a retroactive operation--that is to say, you do not want to defeat the earlier part saying that you have a two-year agreement from the date of settling. Second, it says that the retroactivity of substantive terms in effect may not be made to an earlier date than the date notice was given to bargain.

Mr. Taylor: May I go back to subsection 40a(15)?

Mr. Armstrong: Sure.

Mr. Taylor: I am not questioning the substance, but I am not quite clear on the reason for enumerating clauses 40a(15)(a), (b) and (c). I can understand that during any proceeding, if there

is written agreement on any specific issue, it should be accepted and binding on the parties, but I was not clear about the rationale for inserting 40a(15)(a), (b) and (c). What are we getting at here?

Hon. Mr. Wrye: Under subsection 40a(15), you are right on the first part that the matters agreed to by the parties are accepted. Clauses 40a(15)(a), (b) and (c) set out the considerations that the board will take in arbitrating the outstanding matters.

Mr. Taylor: These are things that are not agreed upon, so "account may be taken of," and then you have clauses 40a(15)(a), (b) and (c). I am questioning in my own mind what contribution clauses 40a(15)(a), (b) and (c) make to the work of the arbitrator or the board. It is just not clear to me. In your experience they may be helpful; I do not know.

For a draftsman who is parsimonious with words, as we have already found out--

Mr. Armstrong: The question is a good one. Let me first say that clause 40a(15)(a) derives from a theory that is prevalent in the learned journals about first-agreement arbitration, if I may put it that way, which says that some deterrent should be built into a first-collective-agreement statute to make it clear to the parties who finally reach that plateau that, to the extent they are found by the interest arbitrators not to have made reasonable efforts to achieve the settlement consensually, there may be an iron fist in the velvet glove that will manifest itself in the collective agreement.

I have to be candid with you: That is my understanding of the rationale of clause 40a(15)(a).

Hon. Mr. Wrye: That leaves the door open to a first agreement that has some punitive nature to it.

Mr. Taylor: If there is recrimination inherent in this section, then I would like to know in what way it might manifest itself. When you go before what I would consider to be a quasi-judicial tribunal that is going to make a determination in an evenhanded way, with that type of objectivity and fairness, I would hate to think there was a built-in bias in making the determination because of the legislation. I suspect from what you have said that something of this nature might be present.

Hon. Mr. Wrye: I raised this matter in my opening statement this morning. It is an issue we debated, among others--certainly clause 40a(15)(a). Clause 40a(15)(b) particularly gives some direction on what the arbitration panel is directed to take into account: similar operations and the terms and conditions they have. Clause 40(15)(a) is clearly a matter of some controversy, and you will probably hear this as the witnesses come forward.

First-contract-arbitration legislation in Canada had its start in British Columbia, where there is a punishment, a penalty

beyond the access issue itself. A party who has fooled around and fought, for example, the legitimacy of the union or the legitimacy of the effort all the way faces the potential not only that access to arbitration will be granted but also that the arbitration itself will provide an higher level of settlement than what might have happened if he had not been so totally outrageous in his activities.

I go back to my statement this morning. I certainly have some concerns and, frankly, I have heard them on both sides, from both trade unions and management. I freely say to the committee members that it is an area where we wrestled long and hard. I will certainly take the views of the committee seriously--and I think I am about to hear some from my friend--but it is an issue, Mr. Taylor, that has been out there. It is in some first-contract-arbitration legislation and not in other such legislation. It is not in the legislation as it appears today.

Mr. Taylor: By reference to the Hospital Labour Disputes Arbitration Act you bring in elements of ensuring that a member of the board is in a position to be evenhanded, that there is no conflict of interest. I understand that kind of thing. In negotiations it might be a union representative or a representative of management who is just completely obnoxious, and the human reaction may be one of retribution.

However, surely the interest of the worker is paramount. The victims of the exercise, those who will gain or lose, are the ordinary workers, who have not played any active role in the process at all. I would hate to see the worker prejudiced in any way because of some reprehensible posture on the part of one or another of the negotiators.

Hon. Mr. Wrye: At this stage I would indicate only that we are sensitive to the fact that clause 40a(15)(a) in particular could cause a degree of controversy because, as you say--and I think you are right--the parties themselves, employer and employee alike, once this legislation is in place will ultimately be the ones who will live with it. It is fair to say that we are going to look at what the employer and employee groups say to this committee, and indeed at what the committee members feel, with a great deal of interest.

Mr. Taylor: I was just pursuing the reason for it. I am not here to encourage you--

3:10 p.m.

Hon. Mr. Wrye: The reason, as Mr. Armstrong has suggested, is that there has been historically a view that this kind of clause might have some role in preventing us from having to use the whole first-contract-arbitration section in the first instance.

Obviously, the object of this bill is to get at certain problems, but the less we have to use it because the parties can work together to make the decision they have to make to reach a first collective agreement by themselves or with our help, with

the help of our conciliators and mediators, that obviously remains the government's preferred choice.

Mr. Armstrong: You have raised the whole question of criteria, and you will no doubt hear what I am about to refer to under clause 40a(15)(b). We have been asked, for example, why we stipulated that the terms and conditions of employment negotiated through collective bargaining should be singled out. If the section is largely unorganized, for example, why should we limit the criterion to negotiated settlements? While it is true that you could pick this up, to the extent that a tribunal wanted to pick it up, under clause 40a(15)(c), which is the basket clause, there is no doubt that clause 40a(15)(b) indicates particular weight should be given to the organized settings.

Ms. E. J. Smith: I assume I am correct, then, that clause 40(15)(b) is referring to other similar organizations. For instance, if you were talking now about Simpsons getting organized, you would be looking at the conditions and settlements of Eaton's as a comparison. Is that what it means?

Mr. Armstrong: Yes; in the organized sector, though.

Ms. E. J. Smith: Yes. That is what clause 40(15)(b) is stating at this time. You are pointing out that it is not comparing them with Woolco, which is not organized.

Mr. Armstrong: Exactly.

Mr. South: I missed that. What is the difference between Simpsons and Eaton's and Woolco?

Ms. E. J. Smith: I was just stating examples there, because Eaton's--

Interjections.

Mr. South: What is it, though?

Mr. Armstrong: Ms. Smith was just referring to two organized settings--

Ms. E. J. Smith: Yes.

Mr. Armstrong: --the example of Simpsons and Eaton's is a bit equivocal; Ford and Chrysler would be a better example--and unorganized settings. This provision permits the arbitrator or, indeed, says that the arbitrator may take into account the terms and conditions in a comparable organized setting, but it is silent about the unorganized setting--that is, the nonunionized setting.

Ms. E. J. Smith: Just as you say, we will listen to what people have to say about it, because undoubtedly we will hear about that.

Mr. Armstrong: I think we will hear about that.

Hon. Mr. Wrye: I think there will be submissions on the subject.

Mr. Mackenzie: In fairness, probably more than anything else that comes out of the British Columbia experience is the perception that there may have been more meaningful negotiations simply because the contracts that were imposed or that would be imposed were an amalgam of the organized shops in that particular field, and the view of management was: "Hey, maybe we had better negotiate instead. We might have done better if we had not been subjected to what the standard has become in the organized shops."

Hon. Mr. Wrye: Yes. Mr. Armstrong was just saying it is an inducement. The point that our friend Paul Weiler has made in terms of BC is--

Mr. Mackenzie: I do not necessarily agree with it, mind you.

Hon. Mr. Wrye: I state without any comment that Weiler's point of view is that the lack of use at these times of the British Columbia agreement was that after a couple of very tough arbitrated settlements both sides, the management side in particular, realized that despite the inducement, penalty, whatever you call it, it was better to get on with the job of collectively bargaining than to take your chances in front of an arbitration panel. I think that would be Paul Weiler's view on that.

Mr. Armstrong: That is exactly right.

Mr. Taylor: It is permissive, of course. Account may be taken of--and yet there may be an inference of bias and that inference, even though it is more one of optics than reality, may convey, an appearance of partiality or bias which may be more damaging than helpful in leaving the thing in. I just point that out to you.

Hon. Mr. Wrye: There is certainly some question about it. In debate and as the witnesses come forward and you question them, there are going to be a lot of submissions which will touch on subsection 15. The committee will have full opportunity, even before we get into clause-by-clause debate, to discuss these matters with both the employers and organizations alike. I am sure most of you would be very surprised if they did not.

Mr. Taylor: You will get into a shopping list in this thing. Once you start it, you will have A, B and C and you may end up with the whole alphabet. When an arbitrator or board will either consciously or subconsciously take into consideration all kinds of factors, which is provided for in your basket clause (c) in any event--I can see a committee spending a lot of time debating what should or should not be in when it may be an exercise in frustration and futility.

Ms. E. J. Smith: An arbitrator has to take something into account. That is what he is there for.

Mr. Taylor: It will be all of this. Probably, it will be the whole experience in the labour relations field.

The Vice-Chairman: Any further discussion? I believe we have already covered subsection 16.

Mr. Armstrong: I think so.

The Vice-Chairman: We jumped back to subsection 15. We are on 17 now?

Mr. Mackenzie: Could we stay on 16 for a minute? Could I ask the minister or the deputy to spell out for me how that changes things?

Hon. Mr. Wrye: Yes. The amendment is quite technical. The original subsection 16 had said the agreement would be for two years from its settlement date, and since the settlement date was quite different--it may be several months after notice to bargain has actually been given--we had originally said that any of the provisions shall be retroactive to a date in the past which, in effect, the board of arbitration or the board should decide upon.

That left it open for the board to actually go back for ever, so we have said that, retroactively, it can only go back as far as the date on which notice to bargain was given, which--I think you would agree--could be the day after certification.

The second proviso, as Mr. Armstrong pointed out, is that the only exception to that is--you will notice the phrase, "except its term of operation,"--that the agreement is still two years from date of settlement. Everything else can be retroactive, part way or all the way back, to the date of notice to bargain with the exception of the two-year term of the settlement.

Committee members will be aware that we have quite deliberately chosen a longer period than was under the Canadian labour relations act which is one year. We feel it is important that the parties have that longer period of stability, which, having gone through this obviously, if we get to this point--they will probably come out of this exercise not with a positive frame of mind, one towards the other--will give them a chance to begin to work together and hope to work some of their differences through.

3:20 p.m.

From our perspective as a government, it is important that with the first agreement we will have a good fighting chance to lead to a second and a third and so on. As committee members all know, one of the criticisms of first contract negotiations has been the failure rate on the second go-round. We think with a little longer term, we have taken an action that will aid in the solution to that problem.

The Vice-Chairman: Is there any further discussion? Shall we proceed to subsection 40a(17)?

Mr. Armstrong: This subsection enables the parties by agreement or the minister to extend the time limit notwithstanding that it has expired.

You will remember that basically we have three time limits. There is the 30-day period for the board's direction on whether first arbitration should take place; there are 21 days for the tribunal, be it a board of arbitration or the labour board, to set up the hearing for first-agreement arbitration; and there are 45 days for the board to hear evidence and issue a decision on the substance of the dispute in the first-agreement arbitration situation.

As the minister said earlier, some have argued that these time limits are very tight. Without the power to extend the time limits, the system would be under great strain. Therefore, the power exists. As the minister also said, we look forward to hearing submissions on how realistic the time limits are, independent of the power to extend.

Hon. Mr. Wrye: We may hit fairly complex, major situations such as the Visa situation or there may be situations which do not have the import Visa obviously had at the Canada board. My federal counterpart pointed out to me that is only the seventh time the Canada board has been asked to make a determination on access.

I believe there were 19 days of hearings in the Visa case. When you get into that kind of situation or threshold--I guess that is a fair description of that case--and you think about weekends and the like, then no matter what the time limits are, whether we stay at 30 or go to another number, there may be a need to extend.

Obviously, there will be the odd situation where an illness or something will force one to extend. However, it is not my desire to get into a mode where we are extending on a regular basis. I think I have made it clear and I will to the parties that is not our desire. We want this done in as timely a fashion as possible.

Mr. Taylor: Is this type of clause prevalent anywhere else? I am trying to think where I have seen this. I cannot recall having seen prescribed periods of that may be varied by consent of two parties or the minister.

Hon. Mr. Wrye: It is in the pay equity act--

Mr. Armstrong: It is not an act yet.

Hon. Mr. Wrye: --first reading of which has been given.

Mr. Taylor: Pay equity is still a bill.

Mr. Armstrong: Mr. Pathe points out that it is in the expedited arbitration provision of the Labour Relations Act.

Mr. Pathe: It has the time limits but not the minister's power.

Mr. Taylor: About the power of the parties to extend, even though it is by agreement, the period could be very arbitrary.

Hon. Mr. Wrye: With cases brought before the board, the board can stand down those cases on consent.

Mr. Taylor: I am not arguing about the procedures. You could bring a case here. The board could have a hearing for 10 minutes and then adjourn it, so it has started within the time frame.

Hon. Mr. Wrye: We have done the same with the pay equity bill. The period for negotiation after the bill is proclaimed is 90 days and the period of arbitration if parties do not reach agreement on job evaluation is another 90 days.

As far as policing and ministerial discretion are concerned, one of the determinations of the government is to try to move these matters forward as quickly as possible. Having put them on that fast track, there has to be some escape clause.

Mr. Taylor: I appreciate the need for potential flexibility with respect to prescription periods or time frames. We have discussed already the matter of it being procedural, rather than substantive. Is there some exposure here?

Hon. Mr. Wrye: The reporting by the conciliation officer to the minister within 14 days "may be extended by agreement of the parties or by the minister upon advice of the conciliation officer...." This is in subsection 18(2) of the Labour Relations Act?

Mr. Taylor: Can you find it in any other legislation?

Mr. Armstrong: I can remember the Toronto Transit Commission special act to return to work. It is one of Mr. Mackenzie's favourite pieces of legislation. It provided for arbitration of the dispute on two occasions. The boards of arbitration were required to report within 60 days with the power of the minister to extend that period if requested to do so by the arbitrator.

Mr. Taylor: You are talking about specific circumstances there and also in the section in the Labour Relations Act you mentioned. Here, it is a generic clause. Any of the time periods can be changed by consent of the two parties. What impact will that have on the process and on the workers in particular.

I am most concerned about the ordinary working man who does not have much voice on these things. He has to abide by the process. You could have people on both sides, management and labour, who may not be working in the best interests of the worker. They could work to his detriment.

Mr. Pathe: At the same time, if counsel for the two parties agree they cannot be ready to present their cases by a certain date, it is difficult to conceive of a situation where it ought not to be allowed by agreement.

Mr. Taylor: I am not suggesting that at all.

Mr. Pathe: Or they may want to have time to have another crack at settling it.

Hon. Mr. Wrye: Consider this. Leaving the ministerial discretion alone, which may be something we feel a need to do, you could have the phrase, "the parties by agreement and with the approval of the minister."

Mr. Taylor: Just to keep them honest.

Hon. Mr. Wrye: In other words, the parties themselves could do nothing except recommend to the minister and he still must approve. Mr. Pathe raised the very excellent example where the parties could say, "Look, we are just not ready to go," and they agree to that. You raised the possibility that the parties could say that and the workers could ask, "What is going on here?"

In most cases, the approval would be fairly perfunctory. It is something you and the committee may want to consider. You could have the additional clause in there. It may be useful, but it may not be.

Mr. Taylor: I am only flagging it. I am questioning it but not suggesting an amendment.

3:30 p.m.

Mr. Mackenzie: I think that the minister is potentially asking for trouble with the clause the way it is. I would much rather see it triggered if there was a request for agreement from both parties.

Hon. Mr. Wrye: You mean just automatically triggered, Mr. Mackenzie?

Mr. Haggerty: From either party?

Mr. Mackenzie: No. Both.

Mr. Armstrong: What about the arbitrator? Let us assume that the arbitrator receives submissions and, in good faith, cannot really do justice to those submissions without exceeding the time limits by whatever--two, three or four days. Should that situation be taken into account?

Earlier, Mr. Taylor raised the question--Are these time limits directory or mandatory? There is a pretty good argument on the common law that exceeding them by some few days does not nullify the--

Mr. Taylor: I would agree.

Mr. Armstrong: None the less, the layman does not get into this directory or mandatory stuff. Naturally, they think that 30 days means 30 days.

Mr. Mackenzie: Then set a time by which the minister can extend it. Put a limit on it.

Hon. Mr. Wrye: Mr. Mackenzie, are you saying to put a limit on how much I may extend it by?

Mr. Mackenzie: That is right.

Ms. E. J. Smith: Yes. This is one of the things that has been flagged, and we should hear the submissions. That would be my view. It is a very valid point. Just glancing through this, I notice that, although this one is general, there are three things in here where they say you can extend the time. We have really just drawn them all into one and said you can do it at all three times.

There is a very valid point here. Legislation is written for a considerable period of time. Written as it is, it would be possible for a labour minister who did not agree with this legislation to simply never get around to doing anything. I would like to hear the submissions and then discuss it.

The Vice-Chairman: We are getting into substantive matters here, and it would probably be a good idea, Ms. Smith.

Mr. Taylor: I did not think we were going to make a determination today. It was just a matter of flagging it.

The Vice-Chairman: Sure. I hope we have all recognized that.

Hon. Mr. Wrye: Flag an important issue.

The Vice-Chairman: Here we are at subsection 40a(18), and where is John Lane when we need him?

Mr. Armstrong: This is the section that exempts the construction industry. We had some discussion this morning about this section in response to Mr. Lane's question. You will be hearing representations on this. I do not know if you want any further elaboration on it.

It is our view that the bill is not appropriate for the industrial, commercial and institutional sector of the construction industry. Beyond that, it is a question of argumentation. You will hear it.

The Vice-Chairman: Any more comment at this time? Let us move on to subsection 40a(19).

Mr. Armstrong: Subsection 19 is intended to cover the situation where, at the time this act comes into force, there is in being a collective bargaining relationship that has not matured into a collective agreement. The intention of this subsection is to accord the parties to that relationship the right to avail themselves of this new provision of the act. In effect, it does that.

The same subsection "applies to an employer and a trade union where the trade union has acquired or acquires bargaining rights for employees of the employer before or after the coming into force of this section...." Then it goes on to say that the ambit of its retroactive operation is limited by reference to the acquisition of bargaining rights on or after January 1, 1984. In other words, it applies to those situations but not to anything that had its origin at an earlier date.

Mr. Haggerty: Instead of the one-year contract, you are extending it to two years. Is that what you are doing under this section?

Hon. Mr. Wrye: No. This is an effort to capture those disputes in which the section 1 requirement of the act has been met, where bargaining rights began any time after January 1, 1984, and there is still no collective agreement.

Mr. Taylor: Why did you feel that was necessary?

Hon. Mr. Wrye: There are some situations in which you have an ongoing dispute. We tried to pick a point at which we are not taking really stale disputes. On the other hand, there are a couple that have been ongoing for some time and we felt there was no reason why they should not be caught by the legislation.

Mr. Taylor: It will be the best part of three years by the time this legislation is through the House.

Hon. Mr. Wrye: Effectively, you will find there are not very many that go back further than--

Mr. Taylor: I wondered why you picked January 1, 1984. Is there some specific reason for that date? Are there disputes you have--

Hon. Mr. Wrye: I do not know of any in the early part of 1984. We tried to pick a point at which everything was not completely stale but which went back a substantial period of time, and we arbitrarily agreed upon that date.

Mr. Armstrong: What was the date of the introduction of the bill?

Hon. Mr. Wrye: November 26.

Mr. Armstrong: We were thinking roughly two years, on the assumption that anything older than two years would likely have so much moss on it that it ought not to be revised.

Mr. Taylor: Are there many situations where you have a bargaining agent who has not been well accepted, you have an application for decertification and another bargaining agent may be ready to step in? Do you call that union raiding, or what do you call that problem?

Mr. Mackenzie: It depends on whose ox is being gored.

Mr. Armstrong: In the new subsection 20 we come to the interaction between first-agreement arbitration and applications for determination of bargaining rights. Perhaps we can deal with that. Is your question at large, asking whether there many termination applications going on?

Mr. Taylor: Yes. I wondered.

Mr. Armstrong: That will be the third statistical undertaking we will give you. The board's annual report gives you a precise indication of the incidence of termination applications. We can give you that. I cannot give it off the top. Do you have any idea?

Hon. Mr. Wrye: No. On this section dealing with January 1, 1984, is it possible that we could round up enough information to share with the committee? Do the members agree what is outstanding?

Mr. Mackenzie: Is the S. S. Kresge dispute settled?

Hon. Mr. Wrye: Where is that? Up in Thunder Bay?

Mr. Mackenzie: Yes.

Hon. Mr. Wrye: I do not think so.

Mr. Mackenzie: Or Burlington Northern Airfreight?

Mr. Armstrong: No.

Mr. Mackenzie: Those are 160 or 170 days old.

Hon. Mr. Wrye: Caisse Populaire has though.

Mr. Mackenzie: You know how they settled it. They settled it by an annual meeting big enough to get rid of eight of the nine board members.

Hon. Mr. Wrye: We can share with the committee what we have out there that might be deemed active.

Ms. E. J. Smith: It would be interesting to look and see what is there. Does the third amendment you have listed here, which has more references back to the health act, come in ahead of this? It must come in somewhere.

Hon. Mr. Wrye: It is next.

Ms. E. J. Smith: It is at the end.

Hon. Mr. Wrye: It is subsection 20. Mr. Armstrong is just about to do that.

The Vice-Chairman: I refer you to the handout of amendments. There are a couple more that go beyond the official printing of the act.

3:40 p.m.

Mr. Armstrong: Maybe I could defer to Mr. Revell on this, and then pick up anything on the substance of it after you have described the design and the reason for it.

Mr. Revell: All right. After the bill was in the House, some concern was expressed by the Ministry of Labour that two cases might have to be dealt with. What happens when there is an application for first-contract arbitration and an application for termination of bargaining rights or an application for certification by another trade union for bargaining rights with respect to employees in the same bargaining unit? In other words, what happens during open season?

The drafting here reflects the ministry's policy that the Ontario Labour Relations Board is going to decide in these circumstances, when you have both an application for arbitration and an application for termination or an application for certification by another union, in which order to consider the applications; or it may decide to refuse to entertain one of the applications.

One possibility is that the board might decide to consider the termination application or the certification application before considering the arbitration application. If it decides to decertify, presumably the application for first-contract arbitration would be finished. If it decides in the other order, the first thing it would do is determine whether there is going to be an arbitration. If there is an arbitration, the other two possibilities would be out. There could be no application for declaration and no application for certification. That deals with the first circumstance.

What happens when, before a collective agreement is reached, either one of these applications is made, that is, application for termination or application for certification by another union? Subsection 21 deals with the fact that an arbitration has been ordered or directed but not completed yet. If that occurs, the application for termination or the application for certification by the other trade union has no effect unless it complies with subsection 57(2) in the case of a termination application or with subsections 5(4), (5) and (6) in the case of a certification termination.

I am not sure of the jargon in the labour relations field, but I have always called these the open season provisions. The new subsections reinstate the open season provisions with respect to a situation where there has been first-contract arbitration.

Mr. Armstrong: Or where it is in process.

Mr. Taylor: Does that automatically stay any proceeding for decertification?

Mr. Armstrong: Actually, it invalidates it. Subsection 21 says that since it is in process--

Mr. Revell: It is of no effect.

Mr. Armstrong: --there will be a two-year agreement from the date of the direction. The open season, therefore, will not descend until the last two months of that two-year agreement. That will be governed by the existing provisions of the act. Subsection 21 nullifies the subsequent application for either termination of bargaining rights or a displacement application for certification.

Mr. Revell: Yes.

Mr. Taylor: Subsection 20 does not seem very definitive. The board could go either way.

Hon. Mr. Wrye: It is a board choice.

Mr. Armstrong: Yes, it is a board choice.

Ms. E. J. Smith: Which they deal with. Am I translating this correctly? Assuming you have two contrary motions in front of you, the board decides which one to deal with. If one wins, the other is automatically out, and vice versa. If you get decertified, automatically you are not going to work on the first contract. If you get a first contract, automatically you are not going to decertify.

Hon. Mr. Wrye: If the board chooses to deal with the access question, subsections 21 and 22 kick in at that point.

Mr. Revell: The possibilities are as follows. The OLRB may refuse to entertain one of the applications. That is quite clear. They will just say right up front, "We are not going to hear application X," and that is it. Under clause 20(d), the board has the power to refuse to entertain any application that is before it with respect to the situation where you have two contrary applications for certification and first arbitration.

Mr. Taylor: They can refuse to entertain an application.

Mr. Revell: That is what it says.

Mr. Taylor: I thought it was mandatory in certain instances.

Mr. Revell: In the situation where you have two applications before the board, it has the power to refuse to entertain one or other of those applications. Remember, under subsection 20 you have two applications that are contrary. That is the word Ms. Smith used, and it puts it in a nutshell. Once an application for first arbitration is granted, it leads to compulsory arbitration. The other application is for decertification, which gets the union out of the picture completely. To that extent they are contrary applications.

Under clause 20(c) the permutations are that if the board decides to hear access first and grants access, it is probably going to automatically refuse the second application. That seems logical. If the board decides to hear access first and denies

access, it still has to deal with the issue of the other application, which it may refuse to entertain, or it may decide to entertain the decertification application or the certification of another union application.

After it has entertained that motion, the question is still open to it to decide whether to grant that particular application. The board's discretion is not limited, but there are various permutations and combinations.

Ms. E. J. Smith: I gather subsection 22 says that assuming you have given union X a two-year contract, which would give us two years for peace to reign, no other union can be looked at until two months before the end of that two-year contract.

Mr. Revell: That is right, until we get to the open season they cannot. Subsections 21 and 22 are parallel.

Mr. Haggerty: No union raiding.

Mr. Revell: Subsection 21 deals with termination and subsection 22 deals with exactly the same problem in relation to certification of another trade union application.

Ms. E. J. Smith: Yes.

Mr. Taylor: How does that jibe with subsection 40a(2), in which the board must consider and must make a decision?

Mr. Revell: This subsection only works in the situation of there being two competing applications on the table at the same time.

Mr. Taylor: I do not know how you would get two at the same time. One application is for decertification and one is for compulsory arbitration.

Mr. Revell: Yes.

Mr. Taylor: How would you get two? Can you file them on the same day?

Mr. Haggerty: Sure you can, depending on how many votes you get.

Mr. Mackenzie: You get a petition against the certification.

3:50 p.m.

Mr. Taylor: If the board is seized with an application for contract arbitration, subsection 40a(2) says the board "shall direct the settlement of a first collective agreement by arbitration." There is a statutory duty on the part of the board to direct a first union contract.

Mr. Revell: I submit that this is a later particular provision. To that extent it will override the earlier provision.

On top of that, the special circumstance under which it operates is that before the board makes its final decision on the access question, this second application comes in. From the point of view of logic, in these circumstances it seems the board may very well want to consider what is going on here.

If a trade union is asking for settlement of a first agreement by arbitration and a substantial number of employees are asking for decertification, or if there is an application by another trade union for certification--I do not want to speak to policy here--but in this circumstance fairness says that before the board considers the access question, it should have the discretion to determine whether these people want to be represented by the trade union that is bringing the application on their behalf, because the effect of first-contract arbitration is to lock them into a contract for two years.

Mr. Taylor: With a named bargaining agent.

Mr. Revell: With the first bargaining agent.

Mr. Mackenzie: You did not get that in the first place unless you got certification.

Mr. Taylor: That is right, but there are two parts to that. Earlier this morning we went over subsection 40a(2). One part is permissive in that the board has a discretion as to whether first-contract arbitration is required, but in certain circumstances it has to direct a settlement. It is the mandatory aspect that concerns me in terms of a parallel application for decertification.

Mr. Armstrong: I understand your point on that score and the legislative counsel's point that the later, more specific and precisely defined situation would prevail. I defer to counsel. Sometimes you use the magic phrase "subject to the subsection."

Mr. Revell: Or "notwithstanding."

Mr. Armstrong: Yes, "notwithstanding," or whatever. You use it later and say "notwithstanding one or the other" to reconcile them.

On the issue of substance, just to repeat Don Revell's point, let us say, lo and behold, you get the application for first-agreement arbitration at about the anniversary of the certification when a termination application is timely and the union knows that the employees have been circulating a petition and are about to put it in to the board. To try to pre-empt that timely termination application, it quickly puts in an application for first-agreement arbitration.

This section is saying the board ought to be able to assess what is happening and make a determination of what is going on and what is in the best interests of the persons being represented. The power that is being conferred on the board here has an antecedent in subsection 103(3) of the act on page 60.

The act talks about an application for certification outstanding, a decision not having been made and a timely replacement application for certification or termination application coming in. The board is given similar powers to make a determination as to the sequence in which to deal with them. I guess it just mirrors that.

Ms. E. J. Smith: If the choice is to deal with the first contract legislation, they would go back into the obligatory category.

Mr. Armstrong: That is true, yes.

Ms. E. J. Smith: "Mandatory" is the problem.

Mr. Armstrong: It vests in the tribunal the power to make the appropriate inquiries as to what is really going on in these critical open periods and whether or not the application for first agreement arbitration is a defensive mechanism or kind of a pre-emptive mechanism for unfairly curtailing either a displacement application for certification by a rival trade union or a bona fide termination application.

I think it can be predicted that you will hear from the trade union side that there will not be great enthusiasm for this. They will say, "If the application for first contract arbitration is there, the board ought to deal with it and should not concern itself with competing applications either by a rival trade union or by dissident employees."

Ms. E. J. Smith: This is a new bill so strange things could happen in the immediate future but in practice, when a union is certified will it not automatically start moving rather quickly toward looking for first contract and, therefore, this would not happen?

Mr. Armstrong: Yes, that is an excellent point. I think this will be a rare situation, indeed, when a trade union allows itself to get into a--

Hon. Mr. Wrye: A position of vulnerability.

Mr. Armstrong: Yes.

Hon. Mr. Wrye: To let the clock run that close to the end.

Mr. Armstrong: It was a point that somebody stumbled on when we were looking at the internal consistency, the coherence of the section.

Mr. Taylor: I am not questioning the intent or spirit of the subsection that was drafted, it just struck me as somewhat contradictory that the board could refuse to entertain any of the applications, be it an application for first contract arbitration or an application for decertification, when it already states further up in the section that it is mandatory not only that it considers it, but that it mandates a contract. Maybe it is there,

but it is just that I have a problem with the way it is drafted, I do not know.

Hon. Mr. Wrye: Remember that subsection 2 says, "on an application under subsection 1." Subsection 1 talks about a situation where we have had a conciliation board or a no-board and that is all we have got. Subsection 20 talks about another wrinkle. Not only have we got the conciliation board and they have gone through a conciliation officer and had a no-board or we boarded it, but also at one and the same time we also have this additional wrinkle called an application to decertify or an application for certification by another trade union. In that case, the board is then given a different direction than what it is given under subsection 2. Is the situation under subsection 20 different than under subsection 1. Maybe it is because we have added it, I do not know. Is part of the concern Mr. Taylor has raised the placement of this in subsection 20.

4 p.m.

Mr. Armstrong: I think it is part, and to extent I share the drafting dilemma. It is partly the fact that clause 40a(20)(d) says, "refuse to entertain any of the applications." Maybe Mr. Revell can elaborate on that because that is different from saying the board may ultimately reject the applications, having considered them. To say that it may refuse to entertain any of them might give rise to--

Mr. Wrye: There may be a concern that the board may do nothing.

Mr. Taylor: It may refuse to be seized of the issue at all.

Mr. Armstrong: It may say, "We are not going to hear any of this stuff," and tosses it out, which on the face of it sounds kind of silly.

Mr. Revell: All I can say to this, Mr. Armstrong and minister, is this reflects the instructions I received, and I think that is something we should we--

Mr. Armstrong: Yes. I am not saying so myself, but I understand the point.

Mr. Revell: I would suggest that while the idea is on the floor, there is an opportunity to look at it and make the intent clearer.

Hon. Mr. Wrye: Help me with this. On a practical basis, what is the intent of doing nothing? I understand from clause 40a(20)(c), the board may first consider the applications in whatever order it considers appropriate or; (d) do nothing.

Mr. Armstrong: I do think it was meant to say do nothing.

Hon. Mr. Wrye: Is it not what it says here?

Mr. Armstrong: It was really meant to say refuse to entertain a subsequent application or an antecedent application.

Ms. E. J. Smith: It was meant to say "any of the amended portion" rather than "anything."

Mr. Armstrong: If you go to the origin of this, it is "refuse to entertain a subsequent application" because it may say if we are satisfied that the application for first agreement is in order, it is okay and therefore we are not even going to entertain a termination application.

The difficulty comes when you say, "refuse to entertain any of the applications." You get away from the kind of temporal question into a kind of a no-man's-land of a potential absurdity when they say, "We do not want to hear any of this."

Mr. Revell: It may be something like this, "and if it grants the first application that it considers, it need not entertain the other applications." That is really the concept we are at. You take a look and regardless of which order you decided to hear them--

Mr. Armstrong: Once you have dealt with one, you may refuse to entertain the others.

Ms. E. J. Smith: They may be mutually exclusive. It seems to me we have made three amendments. Is it possible for us here to clarify this now before it goes out or we are going to be listening to all kinds of submissions?

Mr. Haggerty: This is only an amendment.

Ms. E. J. Smith: This is an amendment, I realize that.

Hon. Mr. Wrye: The amendment is not moved and--

Ms. E. J. Smith: We should amend it before we send it out.

Hon. Mr. Wrye: I do not know whether the intention was to send these out anyway.

Ms. E. J. Smith: Before we allow others, it just seems to me if what is here does not read the way it is intended, we are only going to be inviting submissions that have no meaning.

The Vice-Chairman: Ms. Smith, the public really does not have these amendments so they will not be making any submissions on them. You can only make submissions based on the--

Hon. Mr. Wrye: Mr. Chairman, I think we can clean it up rather quickly and try to get back to you tomorrow or certainly by the end of the week with a reworked version to the extent that witnesses want to speak to it and it is not clear and the committee is not comfortable with the technical wording of it. I think we should make sure that we clean it up, we are all agreed.

On subsection 40a(22):

The Vice-Chairman: Can we go on to subsection 22?

Hon. Mr. Wrye: This is a tough one.

Mr. Armstrong: I think we have done subsection 22. Subsection 21 deals with the application for termination of bargaining rights and, as we have said, it is nullified by the decision of the board to proceed under the first agreement application, that is to say, when it is given a direction.

Subsection 22 is the same in respect to what we call a displacement application for certification in the open period. Again, when the board has given a direction under subsection 2, that it has decided to deal with the first agreement arbitration, the pending application for replacement by way of certification is rendered null and void and may only be resurrected in the next open period, which would be the last two months of the written first agreement.

Subsection 23 is a standard provision in all labour statutes that excludes the operation of the Arbitrations Act, which is an act dealing with commercial arbitrations and, in almost every respect, inappropriate to a labour situation. For example, it provides for appeals to the Court of Appeal. I must say, Mr. Revell, I am rusty on the content of it, but it has no application to labour arbitrations.

Mr. Revell: There are number of reasons. The Arbitrations Act is basically a commercial arbitrations statute and provides for how submissions are to be made, the appointment of the arbitrator, provides for certain rights of appeal, and so on. Generally speaking, the Arbitrations Act has been excluded from labour arbitration matters because of the specificity of the Labour Relations Act.

Mr. Taylor: Is that not in the act now?

Mr. Revell: It is in with respect to section 44 arbitrations; it would not apply to this without either an internal reference or setting it out.

Mr. Taylor: It is just the section. It is under a different part of the act and does not apply to certain sections.

Mr. Revell: Yes.

Mr. Armstrong: That is right.

The Vice-Chairman: Is there any further discussion on these amendments?

Mr. Mackenzie: Who is our witness tomorrow?

The Vice-Chairman: We have one brief submission in the morning at 10 a.m., from the Federation of Engineering and Scientific Associations. The United Steelworkers of America were

scheduled to appear at 11 o'clock. It is now been delayed till Thursday. Unless we hear from anybody else, we will just have the one submission in the morning. We may have a very short session tomorrow unless we get into other discussion after that submission, but that is the way it stands.

Mr. Haggerty: What is on for Thursday?

The Vice-Chairman: On Thursday there will be the United Steelworkers of America at 10 o'clock. We have a submission from Bruce Dodds, a private citizen at 4:30. I do not suppose there is any way we can change some of that time. The time was established for 4:30 because Mr. Dodds had to take time off work, so we have accommodated him.

If there are no further questions, we will adjourn till 10 o'clock tomorrow.

The committee adjourned at 4:10 p.m.

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STANDING COMMITTEE ON RESOURCES DEVELOPMENT
LABOUR RELATIONS AMENDMENT ACT
WEDNESDAY, FEBRUARY 26, 1986



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Lane, J. G. (Algoma-Manitoulin PC) for Mr. Stevenson

Reycraft, D. R. (Middlesex L) for Mr. McGuigan

Also taking part:

Wrye, Hon. W. M., Minister of Labour (Windsor-Sandwich L)

Clerk: Decker, T.

Staff:

Revell, D. L., Legislative Counsel

Witness:

From the Ministry of Labour:

Failes, M., Policy Analyst, Labour Policy and Programs

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Wednesday, February 26, 1986

The committee met at 10:09 a.m. in room 228.

LABOUR RELATIONS AMENDMENT ACT
(continued)

Resuming the adjourned debate on Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: The resources committee will come to order, Mr. South's birthday notwithstanding. We have before us this morning Mr. Shalaby who is with the Federation of Engineering and Scientific Associations. Welcome. I am sure you will introduce your colleague. I believe the brief has been distributed to all members and that you will take us through your brief as you see fit.

FEDERATION OF ENGINEERING AND SCIENTIFIC ASSOCIATIONS

Mr. Shalaby: My colleague is Mr. Chris Bailey, also of the Federation of Engineering and Scientific Associations.

We are pleased to have the opportunity to bring our concerns regarding the Labour Relations Act, partly on the specific matter of what you are considering and partly on other related concerns with the labour relations scene in Ontario that affect our groups.

I heard this morning from several members that they were surprised to find engineers and scientists concerned with matters having to do with labour relations, contracts and bargaining rights. It is our intention to bring to you our concerns and to update what is happening with the professionals, engineers, scientists, managers and employees in Ontario.

Let me quickly give you a brief idea of what our federation is all about and tell you as well, that we are speaking on behalf not only of our federation members but also on behalf of a large coalition that supports the brief we are presenting to you.

The Federation of Engineering and Scientific Associations has been in existence for about 14 years. We represent some 20 groups of employees in engineering, scientific and managerial capacities; groups working at companies such as Atomic Energy of Canada Ltd., Bell Canada, Northern Telecom Canada Ltd., Spar Aerospace Ltd., Ontario Hydro, Toronto Hydro, Mississauga Hydro, the city of Edmonton, the city of Calgary, research institutes out in Alberta and numerous other companies that are listed in our appendix.

We represent some 9,000 to 10,000 professional employees in the scientific and technical field. We have had concerns. The point we want to bring to you is this constituency is a large one

and growing. Its significance in the economy is growing. We desire to be part of the labour scene. Our members have needs for the protection of the labour legislation but do not enjoy it right now. We would like to operate with the protection of the law, but the law does not include us. We are excluded from bargaining. Many of our members and potential members are strictly prohibited from bargaining collectively in this province. We feel the time has come to bring the statutes of Ontario up to date and in line with the Charter of Rights and other jurisdictions in Canada.

Mr. Chairman: Mr. Shalaby, before you go any further, may I remind you that this committee has been charged with dealing with Bill 65, which is An Act to amend the Labour Relations Act. It specifically deals with first-contract legislation. I know you have dealt with it more as the Labour Relations Act. Your approach is as though we had a broader mandate than we really have. Keep in mind the responsibilities with which we are formally charged, namely first-contract legislation, instead of the entire act.

Mr. Shalaby: The majority of our discussion will be on Bill 65, but I hate to miss this opportunity to bring to your attention other things that are of concern to us.

Mr. Haggerty: I am sure Mr. Chairman, that the engineers are certified.

Mr. Chairman: Certified engineers.

Mr. Shalaby: Some are. The reason for taking this opportunity is we have been unsuccessful in our attempts to get an audience with the Minister of Labour (Mr. Wrye). We hope to get that audience and bring to his attention our concerns.

I promise not to belabour the points very much, but I cannot resist the opportunity of laying it on at this stage.

Other people supporting our concerns and our brief include the Ontario doctors who have been on strike over the last couple of weeks--

Interjection: Psychiatrists.

Mr. Shalaby: Yes, psychiatrists, the Ontario Dental Association, the Ontario Nurses' Association, a number of people in the teaching community and the Ontario Confederation of University Faculty Associations. Our concerns are also shared by a very large number of employee professionals in other sectors of the economy as well.

Mr. Mackenzie: Are the crown attorneys still in the coalition?

Mr. Shalaby: The crown attorneys are part of our coalition as well. I will touch very quickly on our concerns.

One of the most significant ones is the issue of managerial exclusions. The act says that anybody who is exercising a managerial function should be excluded from bargaining units.

Although we agree with the spirit of that, we do not agree with the way it is applied in Ontario. In Ontario, the Ontario Labour Relations Board has defined managerial function to mean anybody who makes effective recommendations such as those regarding terms of employment for others. Because we are in supervisory and managerial functions, many of us would have some managerial responsibilities and make effective recommendations, but very few of us actually have the final say on the hiring and firing of other employees. We would like the Ontario Labour Relations Act to focus more on the actual authority, the bottom line, the final say. Those who have final say are true managers. Those who make occasional recommendations do not have the final say and therefore should not be considered managers. This would open the field for most of our people to become employees rather than managers in the sense of the law.

The next point is allowing supervisory employees to form their own units. We feel the restricting provisions in the Ontario codes and laws regarding supervisory units should be relaxed and liberated.

Other points include awareness, particularly on the Ontario Labour Relations Board. Members on the board are unaware of the concerns of professional employees and we would like the board sensitized more to the concerns of professional employees such as ourselves.

Certainly the issue of first-contract arbitration was big on our agenda. We put it last in our executive summary to hold your attention to the very last point. We did not want to put it first. Then you will not read the rest of it.

We came to various bodies of the government and to various committees 10 or 15 years ago. We have been banging on this door for years. The answers we have heard sort of zoom in on why this would not work. Professional employees should not be given these rights because there would be conflict of interest in the work place. How could it work?

We are coming to you 15 years later and we are telling you it has worked. It has worked on the federal scene. It has worked in Quebec. It has worked in British Columbia. It has worked right here in Ontario, albeit outside the Labour Relations Act. It is working. There is no conflict of interest. There are no unusual labour relations problems arising from managerial and supervisory employees getting certified or bargaining collectively with their employer. All we want to do now is formalize that into law.

We are coming to you after the experience has worked successfully and we would like now to update our laws to confirm what is really happening out there.

To keep my promise and not drag this out much more, I will introduce Mr. Chris Bailey, who will zoom in on Bill 65 in particular.

Mr. Bailey: What I propose to do in focusing on Bill 65 is briefly outline rather unusual experiences one of our groups in

Quebec had with first-contract arbitration in that province. This points out some of the deficiencies you can get. Then I have a number of specific suggested changes in the wording of the act as drafted.

CAE Electronics Ltd., formerly Canadian Aviation Electronics Ltd., is a major manufacturer of flight simulators in Quebec. Their engineers and scientists formed an association and attempted to get certified under Quebec law. Seven years later, they were still struggling to get recognized and certified. An article in Le Devoir called it seven years of legal guerrilla warfare by the employer.

It reached a crunch, a decision point, when a partial unit representing only those engineers who were certified by the Order of Engineers of Quebec were able to form a separate unit. They started a strike.

At that point the employer requested first-contract arbitration. His request was not answered until the strike had been going for three months, at which time the unions funds were exhausted and first-contract arbitration was imposed.

It took a year and a half to get that first contract. The employer first took the position, after a fair bit of initial fencing, that he had asked the board of arbitration, the conseil d'arbitrage, to be appointed to mediate but he did not want them to arbitrate. The Minister of Labour had no right, in fact, to appoint a board that went beyond the scope of the original request.

The next approach by the employer was to say that the union had bargained in bad faith and therefore arbitration should not be imposed. It was pointed out that the employer had asked for the remedy, ostensibly against the union's bargaining in bad faith. The employer turned around and said, "Okay, in that case, we bargained in bad faith and it would be improper under law to reward our bargaining in bad faith by having a first contract imposed on the union."

10:20 a.m.

The arbitration council, after some time, eventually decided that it had not and this was appealed to the courts. There were numerous appeals to the court all through this. In fact, every time the union got a new member, the employer would deny he belonged to the Order of Engineers of Quebec and when the union filed a grievance and would take it through, the employer would appeal the grievance as high as it could go. You had to go to two levels of the courts to get dues collected on one new member.

At any rate, when finally it was ruled, with no more legal appeals, that the board of arbitration did have the right to arbitrate, the employer took the position that he had a right to present as much evidence as he wanted. Every piece of evidence presented by the union had to have its pedigree.

For example, if you had documentation or some source of data, you had to bring in people to say: "Yes, this was the data

that was published by such and such a body. I have checked all the numbers and all the numbers are correct." You had to provide the kind of legal proofs you have in a murder trial, but are very unusual in labour relations.

Finally, the arbitration board was ready to rule, nearly a year and a half after the period of the contract they could apply. Mind you, in Quebec, you are allowed to have a contract for only one year.

As a result of the compromise that was reached, the employer agreed, first, to allow the contract to apply to a different set of dates--it would apply up to approximately four months after the arbitration was ruled in--and it would not appeal it if the contract that was imposed was precisely the employer's final terms on every issue. In fact, that is what was imposed. The union is now decertified.

There are drawbacks.

We have had a look at this specific legislation and I would like to go through it section by section, pointing out some areas where the wording is not as good as it could be, partly based on our experience in Quebec and partly based on just looking at the language.

In the very first section, subsection 40a(1), we believe the words, "unable to effect" should probably be changed to "have not reached." The problem with "unable to effect" is that is a matter of opinion. It is a matter of fact that the parties have not reached agreement, but as to whether there is a possibility that an agreement can be reached, for example, the employer can go to the Court of Appeal and say: "Sure, we are quite able to effect it. All the union has to do is agree to my terms. There is no inability to effect an agreement. Just the stubbornness of the union is preventing it."

This starts the whole process, and it should not be subjected to that kind of legal challenge.

In subsection 2, we do not like the approach taken. We recognize there has been an effort by the Ministry of Labour to change the concept that bargaining in bad faith is, in effect, a finding of cause. I suppose adultery used to be a basis for divorce and they finally got rid of that.

What you have here is bargaining in bad faith with rather more words. For example, we will draw the example of the Canada Labour Relations Board experience, the Canada Labour Code, where there has been a bargaining in bad faith, first-contract arbitration tie-in. The result has been that very few unions have used it and have not been very successful in getting it.

There are two problems. One is it denies the requirement to prove the employer has refused to recognize the bargaining authority of the union or has not made reasonable efforts or has brought forward uncompromising proposals without any reasonable justification.

The employer will come along and say, for example, "I had reasonable justification," and trot out all his arguments. There are very few positions that cannot be justified. You are left then with a legal challenge. If the board goes ahead, even though it says, "where it appears to the board," the employer will go along to the Court of Appeal.

Remember, we are not dealing here with a reasonable ordinary employer. We are dealing here with that small minority of employers who are very hard line and who will take every opportunity for a legal challenge. You must write legislation here that does not open up the opportunity for employers to go off and challenge it.

We would prefer to see in subsection 2, provision that if a contract has not been reached in a period of time after conciliation, say, 30 days, either party has the right to apply. The simple fact that you have not reached it after a period of time should be sufficient.

If there is something that is chancy, if the union is in the position where it is not sure--if it makes its application, the labour board may deny it--then it may not apply. It discourages applications, because when you apply for first-contract arbitration, you are throwing in your hand. You are telling your members and your employer that you have despaired of being able to get a reasonable contract out of the employer.

The process of bargaining, whereby one party can say to its members and to the other side, "I am sure we are going to reach an agreement on something that we can live with," is part of the dynamics of bargaining. You lose that. Any union that has any expectations of being able to get a contract out of bargaining will not think of first-contract arbitration. It is denied. They do not want to take the chance. There is too much to lose.

Thirdly, the fact that it opens up areas for appeals allows the employer some tradeoffs. Behind the scenes, the employer will say, "Fine, I am prepared."

For example, in the Canadian Imperial Bank of Commerce Visa case, the Bank of Commerce was all set to appeal the Canada Labour Relations Board's decision to apply a first contract, until the terms of that first contract were announced. Then it said, "Fine, we can live with that." One could read into this that possibly the CLRB, in imposing that first contract, deliberately softened the terms so as to persuade the employer not to argue against it. That kind of tradeoff annoys people. They came to a reasonable contract. In all its terms, it corresponds to what the rest of the industry is getting.

Mr. South: Can we make comments as he goes along?

Mr. Bailey: Sure.

Mr. South: Is not the big thing to get that first contract, even though it is not a good one from the employees'

point of view. They are now certified. They are the union and legally recognized. Then they hope to do better on their next contract. It is the thin edge of the wedge.

Mr. Bailey: It is helpful, but they have postponed the real crunch until the next time.

Mr. South: That is fine. Rome was not built in a day.

Mr. Bailey: Okay. When a union has fought its way into a work place, has established itself, has been certified and drawn a first contract from the employer, then the employer is forced, in signing that first contract, to recognize that the union is there to stay. When you have to go through the labour board to get that first contract, your position is shakier. That is a fact of life. You have been given a respite or a truce.

The one thing the union must have going for it is the terms of that agreement. For example, let us look at the Visa workers. If I was a worker in some other part of CIBC, I would say, "Yes, they got in. The union contract that was imposed by the board after a six-month strike gave the union security, some kind of grievance protection and job security. However, the thing that really aggravates me and the reason I would want a union in here is to improve the wages. They were not able to do anything about that."

You do not want the union going to first-contract arbitration instead of negotiating, and any union with any sense prefers an agreement that is negotiated and forces the employer to come along and say, "Yes, I had to concede those terms." It is a much better start to a relationship. It is a stick there.

You cannot say to the employer, "If we cannot reach a reasonable agreement here, I am going off to the labour board, and what is going to happen at the labour board is that, because of deficiencies in the act, you are going to end up with an agreement worse than the one you are trying to get right here at the bargaining table." The employer will say: "Go. I do not care. It is no better than what you are asking for. In fact, I could probably live with what the board imposes better than I can live with what you are asking me to do."

10:30 a.m.

To be a stick or a threat to induce the employer to reach an agreement with the union, the board must threaten the employer with better terms than he would be forced to concede through bargaining. On the other hand, the employer can then turn around and say, as many employers would: "Those may be the terms imposed by the board, but they did not come from me. In the second contract, I am going to try to get rid of them." If you give poor terms and allow the employer to deny any part in those terms or any responsibility for those terms, he is having his cake and eating it.

Mr. South: I have heard you, but I do not agree with you.

Mr. Bailey: Okay. I have a number of points. Maybe it would be best to ask questions on the points as I go along, as it is easier to deal with them.

Ms. E. J. Smith: Are you saying we should give them as they come along?

Mr. Bailey: Yes, I am suggesting that is the best way. I will go on to the next one.

Subsection 40a(3) provides that there will be a private arbitrator or privately agreed-on board unless both parties agree to take it to the Ontario Labour Relations Board. Our feeling is that the OLRB would have the greater experience in interest arbitration of this type as opposed to rights arbitration

We would rather see the first contract settled by the OLRB, unless both parties agree within seven days that it go before a private arbitrator.

It is a question of where you would go if the parties cannot agree. I think the OLRB is the better place, simply because it has greater experience in this area.

Ms. E. J. Smith: What are you saying would happen now?

Mr. Bailey: What happens now is that it gives either party the right to insist that it be settled by a private arbitration board. I have a lot of respect for private arbitrators--they are very skilled--but their basic area is grievance arbitration rather than first-contract or interest arbitrations. The OLRB has the greater experience, and that should be where it goes unless the parties agree otherwise.

Ms. E. J. Smith: You are saying the two-party agreements should be sent to the board.

Mr. Bailey: Right now, you need two parties. Both have to agree to take it to OLRB. I would prefer that both parties have to agree to take it to a private arbitrator.

Ms. E. J. Smith: Thank you.

Mr. Bailey: On subsection 40a(6), on the question of language, in the third line it says, "...fail to agree upon a chairman with the time limited...." I could not understand what that meant. I think it means within the time specified in subsection 5. Maybe it is a legal draftsman's term.

Mr. Chairman: I think it means the five days.

Mr. Bailey: Yes, but with or within?

Ms. E. J. Smith: We will put it in.

Mr. Bailey: In the second part of the first sentence of subsection 40a(7), it says, "...but shall give full opportunity to the parties to present their evidence...." This immediately raises, in our mind, the experience that we had with CAE, where the employer insisted on his right to present voluminous evidence going on and on. It took a year to get the evidence heard.

By including that in the same section as "the board of arbitration appointed ... shall determine its own procedure," I wonder whether a lawyer could argue that that would override it. It says, "...shall determine its own procedure..." except that any party can go on giving evidence until it is satisfied that it has given full evidence. I would like to see something that makes it clear in there that the board of arbitration shall have the opportunity to limit or bring to a close the giving of evidence when it considers it should. Perhaps you would want something such as "in the opinion of the board," for example.

In subsection 40a(13), I have a small question about the statutory freeze. There have been some recent decisions. One was a decision of the Ontario Labour Relations Board in respect of Spar Aerospace Ltd. and SPATEA, which is one of our own unions in FESA. There was a similar decision from the Canada Labour Relations Board in relation to the Union of Bank Employees, which held that where the employer denied regularly scheduled pay increases the statutory freeze in fact froze the structure of increases and the employer attempted to deny the regular increases.

For example, I would hate to see you end up with a situation where, if an employer has been required to pay the increases during a lengthy first contract, the employer says this is stricter or tighter language than is called for under the act. I am not entirely sure that there is anything there, but there is the possibility you could be into a conflict with the present interpretation of the statutory freeze.

Clause 40a(15)(b) refers to "...employees performing the same or similar functions in the same or similar circumstances." Is that with this employer or with other employers?

Ms. E. J. Smith: Other.

Mr. Bailey: It should it be specified. I think the intent is "other" but it is not specified, and if you do not specify it, some lawyer is going to argue about it.

Subsection 40a(16) spells out the two-year period. I believe you should have a provision in that section setting forward that the arbitration board or the Ontario Labour Relations Board, as it may be, such as, "may on the request of the applicant impose a longer contract up to three years." The reason for this is quite simple, in view of the kind of times that are involved in a difficult certification and first contract.

Let us go through it. After the union first applies for certification, there may be a six-month period in which a number of issues apply--whether it has representation, the appropriateness of the bargaining unit, a whole series of legal

issues, challenges to the court--before a vote is even taken, the determination that the union has a majority representation in the uncontested part of the unit.

Based on our experience in Spar Aerospace, for example, there may be another six months while the question of manager exclusions is decided by the board. At Spar nearly one-third of the proposed unit was challenged by the employer on manager exclusions grounds. For example, if there was a unit like that in Ontario Hydro, which has 5,000 employees, if that employer challenges a third of that, that is a very long set of hearings.

Let us say it is another six months when they get their interim unit and interim certificate before deciding the question of who is in the union and who is not. The union will serve notice to bargain and start bargaining while it has the interim certificate. However, there will be essentially six months when they are deciding fairly small issues and getting to grips with one another. They finally get their final decision on the unit and they get down to real bargaining. That is another six months.

Now we are 18 months into the process. After six more months of fruitless bargaining, they reach the conclusion they are not going anywhere. There is conciliation. There is a fairly short strike. Another three months pass. Now you bring in first-contract arbitration. It goes to a board. Let us say we have some control over the presentation of evidence before the board and it only takes the board three months to determine it. You now have gone a full two years.

You now have the whole two-year period that you would like to have retroactive because the employer froze everything two years before in terms of pay increases and everything else. You have that full two-year period, and what is going to happen with that first contract that is imposed? It is going to end just about the time when the parties are going to be into bargaining their new contract. Under those circumstances, a board of arbitration might quite reasonably say it is reasonable to impose a three-year contract--two years' worth of retroactivity and one further year.

Ms. E. J. Smith: We get a breakdown.

Mr. Bailey: If you say this is improbable, that is exactly the experience we had at CAE. I suggest it be only on the application of the applicant and I suggest that the board make the final decisions. You really have to give a period of at least a year while the union can get used to the new contract and acquaint its members with the benefits of being certified--the rights and protections they have, for example, in grievance procedures--before that union has to go into bargaining for a new contract.

10:40 a.m.

Ms. E. J. Smith: Can we get into that? This is very important, because it is completely contrary to what I, at least, thought we had in front of us yesterday. My view of it yesterday was that the two years start at the very point you have said it

almost ends. All of the negotiations are laid to rest and the two years provided in this bill are intended for exactly what you have said, two years in which members can see the benefits, live with the conditions and have peace.

Now you have projected a picture where the battling is going on and the two years are almost over before you get to the dotted line. It is very important to know whether you are right or whether my old understanding is still right.

Mr. Bailey: It is normal in most bargaining that there be a period of retroactivity back to the date at which employees would have received their pay increases.

Ms. E. J. Smith: But we have the retroactivity separate.

Mr. Bailey: The problem here is that the retroactivity is read as coming out of that two years.

Ms. E. J. Smith: No.

Mr. Ramsay: Are you misreading subsection 16?

Mr. Bailey: Oh, I see.

Mr. Ramsay: You have the best of both worlds in this.

Ms. E. J. Smith: You have the retroactivity back to when you started. You sign the contract after all this is done and then you get to--

Mr. Bailey: I stand corrected. I misread it.

Mr. Mackenzie: I think there is also a misconception here.

Mr. J. M. Johnson: I think it has been cleared up.

How does subsection 17 react to subsection 16 when the minister has the right to extend the time limit?

Mr. Bailey: Those are time limits, like the five days and the 45 days, for various processes to be finished.

Mr. Chairman: I do not think it refers specifically to subsection 16; it refers to time limits in the bill.

Mr. Bailey: Yes. In fact, subsection 16 is just what I would like to see.

Ms. E. J. Smith: Okay.

Mr. Mackenzie: Unless I have totally missed something in Mr. Bailey's presentation, in any event, I do not think the argument that was advanced about the problems with the makeup of the unit is really a valid one. This legislation takes place upon certification, and the certification has decided what the bargaining unit is.

Mr. Bailey: No. There are provisions under the act.

Mr. Mackenzie: Maybe not in your experience, but it is in industrial unions right through the piece where we have had the fights.

Mr. Bailey: No. Under the Ontario Labour Relations Act there are provisions for an interim certificate. For example, if there are management exclusions and these are under challenge, but it is clear the union enjoys a 55 per cent majority over the part of the unit that is not under challenge, the board can and does give an interim certificate and parties start bargaining while the question of management exclusions is decided. Virtually all engineering issues--

Mr. Mackenzie: For this you want to add a third year to a first-contract agreement?

Mr. Bailey: No, not now. I am satisfied with the two years from being settled, with retroactivity back to any issues. Our concern was the situation where the two years are eaten up. This is what happened in Quebec, but this is a better written act than the one they have in Quebec.

Mr. Chairman: Anything else on the sections?

Mr. Bailey: No, those are the points that we could see.

Mr. Chairman: Are there any questions for either Mr. Shalaby or Mr. Bailey on the presentation?

Mr. Ramsay: Gentlemen, I am a bit concerned about the process. Maybe you could help since I have never gone through legislation before in committee. How does the public get to deal with the minister's amendments that we had yesterday?

Mr. Chairman: A very good question, Mr. Ramsay. I am concerned about that. The minister has indicated the amendments he would like to make to the bill. As it is really hard for people to know the amendments that have been proposed, what we are going to try to do is have a bill printed that includes the amendments. It would require permission of the committee because it is not really part of the bill until this committee has incorporated those amendments into the bill.

It would make it a heck of a lot easier to be able to hand out copies of a bill that had the proposed amendments in it so that we are not carrying on two debates: one on the bill before the proposed amendments and one that we would debate after the amendments were put.

Ms. E. J. Smith: I would support that. This came up yesterday when I raised the point on clarifying one of the amendments. We have to do it in a way that either underlines or puts in different print the amendments that will come forward, to make it legal for us to deal with it that way.

If we do that, let us include in the newly printed piece of information what we discussed yesterday and get some agreement with the minister on the clarifications that were made yesterday. Remember, on the last point we dealt with, we agreed that it was unclear and that we would get all kinds of delegations speaking to it--help me out on what that was.

Mr. Chairman: On the retroactivity, the two years?

Ms. E. J. Smith: No. It was the last thing we dealt with yesterday, which was in the amendment; the minister agreed the way it read was unclear and would be misinterpreted by the public. Therefore, we should correct the amendment before we print it.

Mr. Ramsay: This was subsection 20(d)?

Ms. E. J. Smith: Right.

Mr. Ramsay: We were not sure whether that referred to just the above applications or the first applications, to begin with.

Mr. Mackenzie: I think you are right in trying to get the bill with the changes, but the amendments as submitted to the members of this committee could not be sent out quickly to any group that has asked for a hearing before this committee. Such groups are handcuffed to some extent in terms of their response if they do not have the amendments that the minister has already indicated to the committee he intends to move; they add a couple of new sections to the doggone bill.

Mr. Bailey: Have you got them in handwriting?

Ms. E. J. Smith: Yes.

Mr. Mackenzie: It seems to me it is important that they go at least to the groups that have indicated they want to appear before this committee.

Ms. E. J. Smith: My interpretation would be that this happens in other committees, such as the standing committee on administration of justice with Bill 1. I would not want to delay the whole process because of some amendments we are going to make; there may be more amendments that will come up along the way. We should we do what we can rather than hold up the whole process.

Mr. Mackenzie: There may be other amendments when we go into clause-by-clause; there is no question about that. However, the minister has clearly indicated to us some changes in the bill, and at least they should be available to them.

Mr. Chairman: There is no problem making sure that everybody who comes before the committee gets copies of the amendments immediately. What I would like to do, though, is to go one step further and have the bill reprinted with the proposed amendments in it so we know what we are dealing with. We can put those before people when they come before us as well.

Mr. South: How long will that take?

Mr. Chairman: A couple of days, I would think.

Mr. South: A day or two?

Mr. Chairman: It is not a big problem.

Mr. Reycraft: My concern was about the time that would take. We went through a similar experience on the standing committee on social development with the pharmacy bills, Bill 54 and Bill 55. What was done there was that, rather than trying to print up an amended bill, copies of the amendments were sent out to all parties that had applied to make representation before the committee.

Mr. Chairman: Let us see how quickly we can get the reprints. We can send out the amendments. That is no problem. We can do that immediately. If we can get the reprinted bill in a short period of time, we will go ahead and do that.

Mr. J. M. Johnson: Are you considering having Bill 65 reprinted with the amendments proposed by the minister?

Mr. Chairman: Exactly.

Mr. J. M. Johnson: This has received first reading in the House. Can we do that?

Mr. Chairman: We can do it only with the permission of the committee and with the understanding that they do not stand as part of the bill until the bill has been amended officially. It is strictly for the convenience of the members and people coming before the committee. It is not a legal--

Mr. J. M. Johnson: For clarification, so there is no misunderstanding, could we leave Bill 65 as printed and then have an amended version stipulating that it has been amended at the request of the minister but that it has not received first reading?

Mr. Chairman: It has already received first and second reading.

Mr. J. M. Johnson: Many people will not receive the amended copy, but they will have this piece of legislation.

Mr. Chairman: It does not rescind this or anything like that.

Mr. J. M. Johnson: No.

Mr. Chairman: Okay. I agree.

Mr. Shalaby: Are copies of the amendments available today for us to take away with us?

Mr. Chairman: Yes. We will get those to you today before you leave.

Mr. Shalaby: Thank you.

Ms. E. J. Smith: It seems to me there would be fewer complications if we were less formal. I agree with Mr. Johnson that we should get the information out but not call it a bill.

10:50 a.m.

Mr. Chairman: You would be happier just having the amendments in this form rather than the bill--

Mr. J. M. Johnson: I agree that it should be drafted in the form of a bill as long as it clearly states what we are doing, because I assume more amendments will be proposed and then we will deal with them all, will we not?

Mr. Chairman: Good point. That is no problem for the ministry?

Mr. Failes: I will speak to them.

Mr. Chairman: Do that as quickly as you can.

Mr. Bailey: I have had a brief look at the changes. As far as I can see, they seem sensible. We have no comments.

Mr. Mackenzie: May I touch base with the witness on two or three of the arguments he has made so I understand them.

On subsection 40a(1), you have had some difficulty with the words "unable to effect." What is your suggested change to that?

Mr. Bailey: "Have not reached." That is a matter of fact, whereas "unable to effect" is a matter of opinion.

Mr. Mackenzie: I wondered about that because we have gone through it at some great length with a number of labour lawyers, and it has been raised but was not seen as a problem.

Subsection 40a(2) is still bad-faith bargaining but with more wording.

Mr. Bailey: We believe that is the wrong approach. We would suggest that the trigger be a period of time after conciliation when the parties have not reached an agreement, an estimated time of 30 days.

Mr. Mackenzie: On subsection 40a(3), your argument is that you prefer it to go to the Ontario Labour Relations Board rather than a private arbitration panel.

Mr. Bailey: Yes, unless the parties agree to take it to the panel. We believe the ORLB, more than the typical private arbitration panel, has greater experience with the difficulties of a first contract because it has been involved in the certification and in some cases with setting terms. To be quite honest, the board tends to be a little tougher or a little less inclined to be

concerned about establishing a track record that is right on the 50 per cent mark.

Mr. Mackenzie: I am not sure I agree with you on that. Nevertheless, I would like a reaction from you on the problem we have with the OLRB. They have not been seized in that many cases with first contracts, and there is a tremendous delay in terms of matters going before the board. We have cases now where one or two years is not uncommon. A universal concern in the trade union movement is how we are going to correct the problem at the board and the effect of loading first-contract disputes on the board. I know there are some fairly strong concerns among the senior people at the board as well.

Mr. Bailey: That may be true. We have had only limited experience with the board. In the handling of such matters, the Ontario board looks good in comparison with the Quebec board and the Canada Labour Relations Board. One of our groups, at Teleglobe Canada, applied to the CLRB for certification more than two years ago and are still awaiting a decision. Therefore, it is a matter of degree.

However, you may be right. In its dealing with matters, my own society has preferred to have a privately hired conciliator, for example, rather than use government conciliation simply because it is more expeditious and it can get better--

Mr. Mackenzie: The other matter is, how real is your concern over subsection 40a(7)? Basically, as I understood your argument, it was in effect that you feared the employers could drag things out or stall in presenting evidence and the requirement that they be allowed to present evidence.

Mr. Bailey: I would not have believed that a party would have been given the power to spin things out, had I not seen it happening with the CAE group. Our legal counsel has suggested it is not a question of the language of the bill but a question of the guts of the arbitration board chairman; if he is prepared to say the procedures of the panel are being abused or it is irrelevant information, it is in his power to control it. That may be so.

However, I am still concerned about having language in the bill that might be read as overriding the power of the arbitration board to determine its own procedures and when a sufficiency of evidence has been heard on an issue.

Mr. Mackenzie: The protection is a concern that usually works in the way that concerns you, but it can work both ways, as I have seen in some cases over the years. However, the time frames in the legislation are one of the few things we have very little concern with. The legislation seems to be tight and to set the specific time frames for the various steps. It is my feeling that probably negates the concern you have raised.

Mr. Bailey: You may be right. Again, it is a question of what happens if you have not reached the end of the evidence in 45

days. One could argue that the minister would almost have to be required to give an extension. The chairman, even if it is on the 45-day deadline, ought to call the parties to heel and ask them to complete their giving of evidence. It is a lever rather than a hard and fast time limit.

Mr. Chairman: Are there any other comments or questions? Mr. Bailey or Mr. Shalaby, are there any other points you would like to make?

Mr. Bailey: We would like to see you again soon, we hope, on the question of exclusion of management and professionals.

Mr. Chairman: If it ever gets referred to the committee, you will be more than welcome to come and share your wisdom with us.

Mr. Bailey: We hope it will be made known to the minister that we are eagerly waiting.

Mr. Mackenzie: Did you not have a press conference here two or three months ago?

Mr. Bailey: It was three months ago.

Mr. Mackenzie: Have you still not had a meeting with the minister?

Mr. Bailey: We still have not had a meeting with the minister. We have had a promise of a meeting with the minister, but I do not believe we have a date. I recognize he is busy and has a very full agenda; I hope these long delays mean that when he does see us, it is because he is prepared to move on this.

Mr. Chairman: Hope springs eternal. Thank you very much for your presentation; the committee appreciates it.

Mr. Shalaby: Thank you for the opportunity to speak.

ORGANIZATION

Mr. Chairman: Before we adjourn, we should have a short discussion about next week. We are scheduled to meet in Sudbury and Thunder Bay next week. At the moment, there is one group in Sudbury that wants to appear before us. There are people from Thunder Bay who still have to get back to us. We are also scheduled to meet in Toronto on Tuesday.

My suggestion is that we meet here on Tuesday morning, go to Sudbury for that hearing and then play it by ear. We should know by tomorrow what we will do at that point.

Mr. Mackenzie: That makes sense. If we do not have any hearing beyond Sudbury, there is not much point in continuing to Thunder Bay.

I want to suggest that the clerk be instructed to contact

the union at La Caisse Populaire in Kapuskasing. Probably in more ways than I could explain, they could outline the difficulties of lengthy, bitter first-contract strikes and what they went through. They could give some members of this committee a feeling of what is involved.

They may be able to come to Sudbury; if not, they may be able to go to Thunder Bay, or they may not want to. I do not know; I have not raised it with anybody involved. I understand one of the difficulties is that the chief representative has been promoted to a Washington post in that union.

Mr. Chairman: I hear Mr. Gordon mumbling.

Mr. Gordon: NorOntair flies to Kapuskasing. Why can we not go to the source?

Mr. Mackenzie: I have no difficulty with that. I am simply saying it would be a useful exercise to talk to some of the people who were involved in that.

Mr. Chairman: The clerk has been in touch with people in Thunder Bay and Sudbury but not those in outlying areas. We could have him do that.

Ms. E. J. Smith: I can see how useful it would be to talk to people who had a bitter strike, but part of our whole plan and what we have laid out is that there are two years in which a company and a union can make peace. It strikes me that if they are in the peace-making process, to highlight their past problems might be contrary to what we are setting out in the two-year cooling-off period. That is a passing thought.

Mr. Mackenzie: It is a valid point except I think the peace-making is almost total. The system totally failed them. What resolved it was 1,600 people at an annual meeting who defeated eight of the nine board members. Within a week, they had a contract.

Ms. E. J. Smith: I am not arguing the process. I do not know the case.

Mr. Mackenzie: It was a lengthy one that had all kinds of representations to all the people involved, including members, the minister and so on.

Ms. E. J. Smith: It might be more to the point if Bob spoke to us about that. That might not create the old animosity precedent.

Mr. Chairman: What is the wish of the committee? Do you wish us to pursue the possibility of going to Kapuskasing? It is a committee decision.

Mr. Lane: I have no objection.

Mr. Mackenzie: Why do we not contact them? They may not

want to appear; I have no idea. It would certainly outline the problems involved in this situation.

Mr. Chairman: I will ask our clerk to contact the people at La Caisse Populaire in Kapuskasing to see if they are interested in appearing.

Is there anything else?

Mr. Mackenzie: Do we have the United Steelworkers of America appearing before us tomorrow morning?

Mr. Chairman: Yes.

Mr. Gordon: Surely there is a labour council in Thunder Bay.

Mr. Chairman: Yes. There may well be.

The committee adjourned at 11:02 a.m.

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STANDING COMMITTEE ON RESOURCES DEVELOPMENT

LABOUR RELATIONS AMENDMENT ACT

THURSDAY, FEBRUARY 27, 1986

Morning Sitting



STANDING COMMITTEE ON RESOURCES DEVELOPMENT

CHAIRMAN: Laughren, F. (Nickel Belt NDP)

VICE-CHAIRMAN: Ramsay, D. (Timiskaming NDP)

Callahan, R. V. (Brampton L)

Gordon, J. K. (Sudbury PC)

Mackenzie, R. W. (Hamilton East NDP)

McGuigan, J. F. (Kent-Elgin L)

Pierce, F. J. (Rainy River PC)

Smith, E. J. (London South L)

South, L. (Frontenac-Addington L)

Stevenson, K. R. (Durham-York PC)

Taylor, J. A. (Prince Edward-Lennox PC)

Substitutions:

Haggerty, R. (Erie L) for Mr. Callahan

Johnson, J. M. (Wellington-Dufferin-Peel PC) for Mr. Pierce

Lane, J. G. (Algoma-Manitoulin PC) for Mr. Stevenson

Clerk: Decker, T.

Staff:

Madisso, M., Research Officer, Legislative Research Service

Witnesses:

From the Ministry of Labour:

Failes, M., Policy Analyst, Labour Policy and Programs

From the United Steelworkers of America:

Gerard, L., Director, District 6

Paris, B., Organizer

Shell, B., Canadian General Counsel

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Thursday, February 27, 1986

The committee met at 10:07 a.m. in committee room 228.

LABOUR RELATIONS AMENDMENT ACT
(continued)

Resuming the adjourned debate on Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: The standing committee on resources development will come to order to consider Bill 65, An Act to amend the Labour Relations Act.

Just before we begin, after the presentation this morning there is not another one until 4:30 this afternoon. That is the only time the citizen could come, and I thought it was appropriate, as did the clerk, that we should try to schedule that person in. While I assume that not all members will be able to be here at 4:30, I hope there will be people here from each caucus this afternoon to extend the courtesy to that individual citizen. That is important.

Next week we meet on Tuesday morning, and then on Tuesday afternoon we go to Sudbury. That schedule is already in place.

Ms. E. J. Smith: Mr. Polsinelli is going for me.

Mr. Chairman: Okay. This morning we have before us the United Steelworkers of America, Leo Gerard. I am sure he will introduce his colleagues. Welcome, Mr. Gerard.

UNITED STEELWORKERS OF AMERICA

Mr. Gerard: Thank you, Mr. Chairman. I would like to introduce two people who are with me today. On my right is Brian Shell, who is Canadian general counsel to the United Steelworkers of America on our staff. On my left is Brando Paris, who is one of the key organizers in our union. He is responsible for organizing most of the units we have organized in Toronto in the last couple of years.

Mr. Chairman: Sorry, is it Harris or Paris?

Mr. Gerard: Paris, like where that funny tower is.

Mr. Chairman: Right.

Ms. E. J. Smith: Is it steel?

Mr. Gerard: That is right.

Mr. Haggerty: Mr. Chairman, on a point of clarification: I see that Mr. Gerard is wearing a red carnation. Is that to celebrate the federal budget?

Mr. Gerard: It was given to me by Touche Ross because they were in such excitement and exuberance and the workers were crying in the room next door.

I should preface my remarks by saying that Mr. Shell will give you some overview of the legal interpretation of the document, but I would like to make a few opening comments about the document.

There seems to be some fear out there that the trade union movement intends to use first-contract legislation to have first contracts imposed rather than negotiated. As the leader of the steelworkers' union in this province--and no one organizes more vigorously in this province than the steelworkers--I can say it is clearly our intention to negotiate our own collective agreements wherever possible.

We fundamentally believe that the best collective agreement is the one you negotiate yourself. That will be our policy throughout the next four years and, I hope, for all time to come, as it has been in the past.

As I am sure you are aware, the steelworkers act very vigorously in obtaining first agreements and will go to great lengths to get them, but the legislation that is nonexistent now, the legislation as proposed, we just do not think goes the right distance to assist in getting that first contract. The power of the corporation in prohibiting first agreements is immense. We have situations where you make an ideological or political decision to have a union, and then the employer has the economic whip to keep you out on strike for as long as he can to prevent you from getting that union.

As I said, it is our intention that, if we have to go that mile to get our agreement, we will do so. However, at some point we should have--and again we will take this position--access to first-contract legislation that will guarantee an agreement.

I just wanted to preface any remarks that you are going to hear today from our people by saying that we fundamentally believe--and we will never change our mind in our union--that the best agreement you can get is the one you negotiate yourself, if possible.

I will turn it over to Mr. Shell.

Mr. Shell: During the course of the presentation I am going to make, I invite the members of the committee to interrupt me and to ask any questions or any points of clarification that they may have as I proceed.

The steelworkers' union in the last decade has been the union that has been, unfortunately, on the forefront of the most complicated and difficult first-agreement negotiating matters. We are the union that negotiated with Radio Shack. We are the union that organized Fotomat. We are the union that dealt with Securicor Investigation and Security Ltd. We are the union that dealt with Ifwin Toy Ltd. We are the union that has been on strike for almost

three years with Shaw-Almex Industries Ltd., and we are now awaiting a decision from the board on that case. We are the union that organized Plaza Fiberglass Manufacturing Ltd. and that recently came to a settlement with Plaza certifying us. We are the union that represents in the province the largest number of small manufacturing family businesses of any union in Ontario. We are the union that has an average of 100 workers in our average local union, and we are also the union that represents the workers at Inco and Stelco.

You should know that we are not merely a union that represents the major resource development entities in Ontario or the major steel companies. The vast majority of our members in Ontario and throughout Canada work at small enterprises where average wages are below \$10 an hour. That is why we appear before the committee very concerned about the scope of the legislation. It is because, probably more than any other union in Ontario, we are at the first-agreement bargaining table. We know what it is like. Our expert negotiators have great experience in first-agreement bargaining.

So we come before you and we say that Bill 65 is a terrific idea. Bill 65 meets, but only partially, the concern that the newly organized workers have. We would have liked to see it afford open access to first-agreement arbitration. We know that first-agreement open access is simply not in the cards. We know that cabinet thinks that first-agreement open access would somehow tip the balance too greatly in favour of the union by permitting the union to seek first-agreement arbitration whenever it felt like it.

We know cabinet does not basically believe what Mr. Gerard has just told you: that the steelworkers and the balance of the unions in Ontario do not particularly want to go to arbitration to get a first agreement. We want to be able to bargain it at the table. We intend to do so, but we know that cabinet does not believe us and, indeed that the Minister of Labour (Mr. Wrye), his advisers and his deputy, from whom you have had the honour of hearing in the last two days, basically do not buy it.

So as probably the most realistic union that exists in Ontario, we have an alternative idea. We have told the ministry what our alternative idea is, and either the ministry has not heard us or it has not cared to understand what we are saying. So we come before you to say that we have an alternative idea that does not mean open access.

I would like to turn your attention for a moment to subsection 40a(2) as set out in Bill 65. That is the most important section of the bill, in our submission, along with subsection 40a(15), and we will restrict our remarks today to those two subsections.

Let there be no doubt about our concerns with other sections. We have concerns here and concerns there. We are concerned that the minister can fiddle around with time limits whenever he feels like it, but let me just say that our emphasis today is on subsection 40a(2) and subsection 40a(15).

By the way, I am grateful that the minister decided to release the amendments he is going to put before your committee. We have no basic and substantial disagreement with his amendments.

You are hearing from a responsible entity, and we expect that you will consider our concerns equally responsibly. You are hearing from the entity that will actually have to decide whether to seek first-agreement arbitration. You are hearing from the political leader who will determine each and every first-agreement strike. Remember, if you do not afford access where bargaining has broken down, that leaves the union in a position to abandon the workers, who have never had a collective agreement, or to strike that company into the ground. Remember that. Those are the options. There is no third option if we cannot get access.

Mr. Gerard: By way of an intervention, it is not the history of the steelworkers to abandon the people who sign cards in our union. That is why we had the Radio Shacks, the Fotomats and the Irwin Toys. We will have a hell of a lot more if you do not listen.

Mr. Shell: Let there be no doubt about the determination of the steelworkers. Let there be no doubt that if we believe the delays attendant upon seeking access are such as to inhibit our ability to obtain a first agreement successfully, then you will have created an obstacle that we cannot circumvent. It will leave no alternative but the strike option.

Subsection 40a(2) says, "The board"--and we are speaking about the Ontario Labour Relations Board--"shall consider and make its decision on an application under subsection (1) within 30 days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration..." We have no difficulty with the section to there. That is fine; we understand that. Then it says, "...where it appears to the board that collective bargaining has been frustrated."

10:20 a.m.

I am a lawyer. I understand what the word "frustrated" means as a matter of law. I understand that the word "frustrated" can mean frustrated because a ship sending supplies to the Vancouver coast has been sunk and, as a result, the entity in Vancouver waiting to receive the supplies is frustrated in meeting the terms of its obligation to its customer in Timmins, Ontario. The courts consider the sinking of the ship to be a frustration of a contract of supply.

I have no idea what the Ontario Labour Relations Board thinks "frustrated" means, and this union is not prepared to wait five years while the labour board interprets the words and while it goes through the court system. We are simply not prepared, and so the word "frustrated" has got to go.

Our suggestion is that you delete the word "frustrated." The test at this stage should simply be, "where no first agreement has been effected by the parties." That is all.

Mr. J. M. Johnson: Would you read the section as you propose it?

Mr. Shell: Our suggestion is that it be, "and it shall direct the settlement of a first collective agreement by arbitration where no first collective agreement has been effected by the parties."

Is there a first agreement or not? That is the first test for the labour board. If the board concludes that there is not a first agreement, then you go to the next test. If there is a first agreement, that is the end of it. However, there is no assessment of bargaining as to whether there is frustration.

We move on from there. The minister and his ministry have decided not to say straight out that the test is bad-faith bargaining but to specify the elements of bad-faith bargaining in clauses 40a(2)(a), (b) and (c). You have heard from the minister and the deputy minister, and if they told you anything different, I suggest that the committee's counsel examine the law on bad-faith bargaining.

The refusal of the employer to recognize the bargaining authority of the trade union is bad-faith bargaining. If an employer were to do that, he would be bargaining in bad faith, and the labour board has repeatedly affirmed that that is the case.

Clause 40a(2)(b) says that if the employer imposes an uncompromising bargaining position without reasonable justification at the bargaining table, he will be bargaining in bad faith, and the labour board has said that that is the case.

So when you come to the bargaining table and you say, for example: "We will not pay more. You can talk us blue in the face; we will not pay more." The union says: "You will not pay more? Tell us why." The employer says, "We will not pay more." The union says: "We have heard that already. Tell us why." The employer says, "We will not pay more." The union says: "This is very repetitive. We are going home. Let us know when you are going to tell us why you are not going to pay more."

That position, you will appreciate, is uncompromising. That position does not provide reasonable justification.

Mr. Chairman: Mr. Shell, since you invited interventions, if the employer said, "Because we simply cannot pay more," is that the same?

Mr. Shell: If the employer says, "It is because we cannot pay more; we cannot afford it," then it has provided a reasonable justification. That is not regarded as bad-faith bargaining. The union's response will be, "Would you please explain to us why you cannot pay more?" They will say, "These are our costs, these are our inventories, these are our sales and we simply cannot afford it."

If the employer explains its position, it is not without reasonable justification. However, the absence of an explanation

is bad-faith bargaining. That is why the words in clause 40a(2)(b) say, "without reasonable justification."

If the employer bargains in bad faith under the terms of clauses 40a(2)(a), (b) or (c)--because remember, section 15 of the Labour Relations Act says that an employer must "make every reasonable effort to make a collective agreement." Clause 40a(1)(c) says, "the failure of the respondent" the employer, "to make reasonable efforts..." That is almost completely borrowing from the language of section 15.

If you look at clauses (a), (b) and (c), what the ministry has done, and it is a cynical approach and it does not trick the entity appearing before you today, is they have specified the terms of the duty when there has been bargaining in bad faith. They have unpacked the duty, as the Ontario Labour Relations Board has interpreted it, and they have said it is clauses (a), (b) and (c).

If bargaining has been frustrated because of clauses (a), (b) and (c), which amounts to bad faith bargaining, then the labour board can move to set up a board of arbitration to settle upon a first agreement.

Mr. Chairman: What difference would it make if you removed clauses (a) through (c) and put in, "because of bad faith bargaining"?

Mr. Gerard: Before Brian gives you the legal response, let me just say if we have to go to the board to prove bad faith bargaining, we are in a real pickle. What you are then into is the kind of thing that we are into with the Shaw-Almex Industries or Radio Shack, where you spend weeks, months or years before the labour board trying to prove your case while these people are on strike.

Forcing people to strike is the first weapon used to make sure they do not ever end up with a collective agreement. While people are on strike, to use Brian's term, you are frustrating the attempt of ever getting a true collective agreement in that plant. That is why Brian's comment about this being a perverse and cynical approach to it is so meaningful.

We have to go there and prove either one, two or three of those points in front of the labour board and that could take weeks, months and years--forgetting about what could be in the first agreement--before we can even ask to have one imposed. That is the whole cynicism of this document. I will let Brian deal with the legal aspects.

Mr. Shell: We have examined the obligations that deal with first agreement in British Columbia. We have dealt with the obligations dealing with first agreement under the Canada Labour Code. The tests that are imposed in those jurisdictions, and Quebec stands as a quite different situation, but those tests applied by law basically amount to a declaration that bad faith bargaining is required.

History has made it clear that the section is not used, that it has no important impact upon the labour relations community, and that it does not get rid of first agreement strikes which is, after all, what this is supposed to be able to do.

Let there be no doubt: this legislation is an order to stop first agreement strikes. That is why we want it. That is why the sensible business community will want it. It is so an employer, recently organized, will not have to face a first agreement strike. We do not want to strike employers. We are not in a strike-happy business. We want first agreements in order to avoid strikes.

Where an employer cannot agree to a first agreement and we cannot see any alternative but to strike, the purpose of this legislation is to provide a third-party intermediary who is not going to give what the union wants and not going to give what the company wants. He is going to sensibly assess what is reasonable in the circumstances and provide something that both sides can at least begin to learn how to live with.

Mr. Gordon: In that case, though, you would want us to drop clauses (a) through (c). What would you put in their place?

10:30 a.m.

Mr. Shell: If an employer has bargained in bad faith, if he has breached clauses (a) through (c), or any of the three, of course there should be access. That is sensible. Our suggestion is that the new clause 40a(2)(a) should read, "if the respondent has breached section 15." It makes eminent sense. If either the union or the company have bargained in bad faith, then of course there should be access. What we are saying is let us deal up front with what we mean--Ministry of Labour, Minister, deputy, advisers.

If either the company or the union have bargained in bad faith, then by golly make it clear that you have access, but do not stop it there. What if they have not bargained in bad faith? What if they have done something that is slightly less than bargaining in bad faith, remembering that in British Columbia and under the Canada Labour Code, the bad faith test has served as an obstacle and not stopped first agreement strikes?

Mr. J. M. Johnson: Can you provide us with the amendment?

Mr. Shell: We have this copy.

Mr. J. M. Johnson: Can we have the clerk of the committee run off some copies?

Mr. Shell: Sure.

Mr. Haggerty: I have a point for clarification. You mentioned that you had two problems with the bill before us, clauses 40a(2)(a), 40a(2)(b) and 40a(2)(c). You also have problems with subsection 40a(15), but your last comment you led me to believe that you agree to subsection 15. Previous witnesses before the committee and with the minister--I have a note here--were

looking for some changes in that area, if I am not mistaken.

Mr. Shell: Just to be clear, we have a concern with subsection 15.

Mr. Gerard: We will be saying something about subsection 15 shortly.

Mr. Shell: --about those two sections and I will be suggesting some amendments to the language in subsection 15.

Mr. Haggerty: We should perhaps have the amendments for both those sections.

Mr. Shell: He has just done that.

Mr. Haggerty: He is getting them?

Mr. Shell: It has just been done.

Mr. Taylor: Why do you need them with that criteria? Why do you not just provide that if there is not an agreement within so many months, that you have this thing arbitrated?

Mr. Gerard: Give them 30 days to have it signed, sealed and delivered. Give us that language.

Mr. Shell: That is an eminently sensible position. I do not know how people are sitting. I know there are some friends here in the New Democratic Party and I suspect there are some friends over there in the Liberal Party. I do not know if the people in the middle are with Mr. Grossman's party. Is that correct?

Mr. Ramsay: They are, but they are on-side, too.

Mr. Gerard: Who is who?

Mr. Haggerty: --mandatory right they are getting. Once they get certification they want it automatically.

Mr. Taylor: You were asking me who I am. My name is Taylor and I am a member of the Progressive Conservative Party.

Mr. Gerard: I am pleased to have you on-side.

Mr. Taylor: I do not know whether or not you have or you have not. I am asking you. Either you are going to have it or you are not going to have it. If you cannot negotiate something within a reasonable time, presumably you go to a third party or body. In the judicial system, you go to the courts. If I hit you with my car and our lawyers cannot work a settlement out, then we have a judicial system that takes care of it. Why can you not do the same thing in this?

Mr. Gerard: We started off our presentation with Mr. Shell, our counsel, saying we were under the impression that the Liberal cabinet was unbending in their position on access, which

we think is unfortunate, but knowing that the cabinet seems to be unbending, we wanted to put forward an alternate solution.

I am quite sure that if we could get your party and our friends from the New Democratic Party to take that position, the minister would listen a little bit more. Once we try to effect a collective agreement and we cannot, we fundamentally believe we should have access to, as you call it, the courts; we call it arbitration.

Mr. Chairman: Mr. Gerard, this committee will be dealing with amendments and does have the authority and power to make amendments to the legislation. When we are finished the public hearing process, we will be dealing with amendments. At that point there will be an opportunity to alter the legislation if the majority of the members wish to do so.

Mr. Gerard: We make it very clear to you that we present an alternate proposal. Brian Shell has been explaining it to you. The first proposal that we would like to see, if you are going to make amendments, is the one put forward by Mr. Taylor. It is if you cannot effect a collective agreement, you get automatic access to arbitration.

I will even go further than that to say in previous discussions with ministerial staff, we suggested it should be after 30 days. If you could not effect a collective agreement and you had to take strike action, within 30 days of that strike action you would have automatic arbitration of the settlement.

Mr. Chairman: We have not seen Mr. Taylor's proposal in written form yet.

Mr. Gerard: In case he intends to draft it, I felt I should give him some guidance.

Mr. Taylor: I will follow that up. Do not misunderstand me. I am asking you the question and then I am following the logic.

With that logic, I believe that in 1986, we should be sufficiently civilized not to get into strikes and lockouts which endanger our economic system and our social fabric. That being so, then surely you should have a tribunal, sufficiently acceptable by labour and management, that could settle these disputes in an open, objective, even-handed way without lockouts and strikes.

Mr. Gerard: Are you talking about first contract disputes?

Mr. Taylor: If that principle is good for first contract, what is wrong with it for second, third or fourth contracts?

Mr. Gerard: I will deal with that. To be very candid with you, in a first contract situation, you are dealing from a position where people generally have never had a labour organization to represent them.

These people are dealing in an environment where all the economic and psychological power is in the hands of the employer. The economic dispute is used to circumvent the possibility of ever having a union. Once we have established our union and once we have made a decision that we are going to have a collective agreement, and we want it for economic reasons; not for the purpose of establishing the collective bargaining agency in the shop, it would be for us to decide and for the employer to decide.

We will bargain that collective agreement and then decide if we are prepared to accept it or to keep the operation shut down. At some point, those skills balance out and we get an agreement.

When you are in a first contract situation, the strike is used by the employer to circumvent the possibility of ever having a collective bargaining agency that can get to the second contract. That is the difference.

That is why your proposal makes sense if you are talking about first-contract arbitration and why it does not make sense in the next one.

Mr. Taylor: Do you think we should have an eye for an eye and a tooth for a tooth, social disruption, confrontation, and classical conflict between labour and capital? I do not understand why you want to perpetuate that type of philosophy in this age.

Mr. Gerard: Mr. Taylor, you started off being progressive and ended up being Neanderthal. Let us go on.

Mr. Taylor: That is your opinion. I do not know that I came here to be insulted by you, but that comes with the territory.

Mr. Mackenzie: You invited it, Mr. Taylor.

Mr. Taylor: That is a matter of opinion.

Mr. Chairman: Let us get back to commenting on the bill. There are Mr. Lane, Mr. Haggerty and then Mr. Gordon.

Mr. Lane: Have the amendments proposed by the minister been circulated to the panel? Has it been read into the bill, as recommended?

Mr. Shell: We have read the motion to be moved in committee. It is this document. As I have indicated, we have no substantial disagreement with these changes.

Mr. Lane: Does it improve the bill or does it do anything for your problems?

Mr. Shell: To be frank with you, these amendments correct an oversight by the minister. The bill does not provide the board of arbitration with any power. It is an oversight and the minister has fixed it. The bill does not deal with a termination, an application or an alternative certification application that arises during the context.

These amendments fill holes. They do not deal with anything substantive in the bill except in a procedural, neatening up of the bill. You will have to ask the minister and his deputy why they decided to do it in this manner. I have no idea. It struck me that it was merely an oversight.

We have no difficulty with the changes. They are not improvements; they are merely housekeeping rules.

10:40 a.m.

I would like to go back to subsection 40a(2). Mr. Taylor, I attended one meeting with your former leader during the election. He spoke very firmly in favour of first-agreement arbitration.

Then I had the pleasure of being in the gallery of the House when the former Premier's throne speech was read. I recall the excitement when the former Premier introduced this. His party was committed to first-agreement arbitration. On second reading, the new leader and the new critic on Labour matters flatly opposed this bill. I did not and still do not understand it.

I am sure there has been merely a misunderstanding by the current leader and the current critic about why it was opposed. I am sure that as a result of the deliberations of this committee, your party will be able to reconsider its opposition to the bill and the improvements we are trying to incorporate that reflect the kinds of concerns you have.

We are trying to make sure we avoid first-agreement strikes. We know that is your party's view and we agree with it. We want to avoid first-agreement strikes. We think the bill can be improved and that it can do that. We are committed to avoiding first-agreement strikes but not to abandoning the idea of a strike. One would not want to abandon the idea of a strike in a free society.

Mr. Taylor: Mr. Chairman, may I respond to that since it was addressed to me, through you? I would like to respond to that and to some of the remarks made earlier which reflected the views of the late Mr. Justice Ivan Rand.

You may recall the study conducted by Mr. Justice Rand in connection with the reform of labour legislation and particularly in regard to strikes in essential services. I have merely reflected a view that he espoused as a commissioner in that study. Mr. Shell, you may be familiar with that. As I said, I have good company in my Neanderthal posture, if that is what it is.

In the Rand report, he was fundamentally dealing with strikes in the area of essential services and I want to make that distinction. However, I am not deterred in my view that surely we should be civilized enough to work out these differences in a nonconfrontational way. Whether first contract or some other contract, I still think it is worthy of consideration.

Mr. Gerard: I want to make one comment very briefly. Mr. Taylor seems to have taken this to heart.

Mr. Taylor: I am not insensitive, if that is what you are suggesting.

Mr. Gerard: You missed the introductory remarks that we made. Had you been here for those remarks, you would have heard us say that it is our position--and I will take you back to arbitrated settlements at any point--that the best settlement you can have with an employer is the one the parties negotiate themselves.

Generally speaking, this is our fundamental reason for being opposed to first-contract arbitration at any time, even 20 years ago. Also, we are opposed to imposing it in a long-term relationship. We believe the best bargain you can get is the bargain you negotiate yourself.

However, probably moreso than ever before in this province, we are now in a position where employers are using the strike weapon against the workers as part of a first-contract weapon to circumvent the possibility of getting agreements.

That is why we have had the high-profile strikes, such as those at Radio Shack, Fotomat, Irwin Toy Ltd. and T. Eaton Co. Ltd. Weapons are being used by employers to circumvent the possibility of having a union.

The labour legislation introduced by your government years ago--and they kept it rolling--is the basic preamble of the act. They encouraged collective bargaining; therefore, they encouraged the unionization of people as well.

Employers have switched that. They are now using the strike as an economic weapon to prevent that. Our role today is to try to get first contracts without the use of strikes. If you have proper legislation when you go to the bargaining table, it removes that strike weapon from both sides. The legislation encourages us to get a bargain ourselves. Both parties would rather have their own bargain than one imposed by an outsider.

Mr. Haggerty: I want to go back to subsection 40a(1). I believe Mr. Shell said he has no qualms about that section.

The previous witness from the Ministry of Labour discussed the words "unable to effect." There was some question about that wording. He also brought up subsection 40a(2) where "has been frustrated" appears. I think that is the key to your difficulties and the committee may have to review those words.

I am coming back to the words "bad faith." I agree with you that if two parties are willing to sit down at a table in a good relationship and come up with a first agreement, that is the way labour and management should go. However, there are cases where there is a total impasse from the beginning, from the first person signing up as a union member in the plant. This is where the problem starts.

What I like about the bill is that where there is an impasse or where you can sense there is going to be no agreement between

the parties, section 40a, the amendment to the Labour Relations Act, brings a third party into the picture. Looking at it from both the labour side and the management side, you say, "Thank God we do have a third party that can bring these two parties together." You have to do it by legislation. Section 40a does that.

It may be a year before anybody applies to the labour relations board and you come into this section. That is a lengthy time for a person to be out on the streets or to have management shut the doors.

I bring this to your attention because I still carry a United Steelworkers' union card. I am still in good standing. However, I was in an industry caught in a strike back in the 1950s. It was a lengthy strike, whether it was necessary or not. It was caught in a stage. If we had had this legislation for the second contract, then perhaps we would never have lost the industry or the 300 jobs. The strike broke the company and the employees.

Mr. Gerard: Where was this?

Mr. Haggerty: E. B. Magee Ltd. in Port Colborne. That is one of the cases where an impasse occurred and both parties took a firm stand and said, "No way are we going to bend."

Mr. Shell: Gentlemen, this is the last opportunity the elected representatives of the people are going to have to comment on this bill. That is why, in the presentation that I am asking you to pay attention to, it is a textual analysis. I know textual analyses are sometimes very dull. I know sometimes it is easier to deal with it in broad principles. We can go into styles or broad principles. Then we can pass legislation and let the constituents deal with it.

What I am saying to you is, please focus your attention on what it is the bill says, not on what people are telling you the bill is going to do. That is why I said if you look at the current language of clauses 40a(2)(a), (b) and (c), it amounts to a bad-faith bargaining test.

The bill that has been proposed requires that the parties either bargain in bad faith before access or "any other reason the board considers relevant." It is our submission to you that not only does that not provide guidance to the board, but it also says to the parties and in particular to the union seeking to bargain a first agreement, "You are going to have to prove bad faith before you are going to get access."

10:50 a.m.

If I could move to where we were before you got the photocopy, the change we are suggesting is that clause (a) in our change makes it clear that one of the reasons or one of the ways you gain access to a first-agreement arbitration is that the respondent, company or union, has breached the duty to bargain in good faith.

We agree with the ministry that this is a reason, but we are saying that is not and should not be the only reason. We have said in clause (b) that if a company or a union has failed to adopt fair and reasonable bargaining positions, then you should be allowed to go and say to a first-agreement board of arbitration, "They failed to adopt fair and reasonable bargaining positions." The response is going to be, "No, we did not fail to adopt fair and reasonable bargaining positions." Let the board determine whether or not they have failed to adopt fair and reasonable bargaining positions.

If the board says, "Yes, they have," then on we go to first-agreement arbitration." If it says, "No, they have not failed to adopt fair and reasonable bargaining positions," then that is the end of it; back to the bargaining table on your own, fellows.

In clause (c) we said that if the board of arbitration concludes that the parties are unlikely to enter into a collective agreement within a reasonable period of time, then by all means let a first-agreement board of arbitration determine the matter. But if, after it has heard from the parties and weighed the evidence, the labour board concludes, "No, the parties are likely to enter into an agreement in a reasonable amount of time," then it will not open the door to a first-agreement board of arbitration. We have left clause (d) the same.

The minister has said he does not want to impose a bad-faith bargaining test. You have heard him say that. The Attorney General (Mr. Scott) has said that. The Premier (Mr. Peterson) has said that. The former Premier has said that. The Leader of the Opposition (Mr. Grossman) has said that. The Labour critic has said that. The Tory Labour critic has said that. But what does the bill actually say? You will see that the bill actually imposes a bad-faith bargaining test by other words. If we mean what we say when we speak to the public, then let us speak honestly to the public. If the Liberal Party wants to introduce a bad-faith bargaining test, then do it in those words. Do not try to circumvent what it is you know the public will not accept by doing it with other words.

We say the test should not be bad-faith bargaining. It should be something less than bad-faith bargaining. We prefer open access. We are not going to get open access. We understand that we are not going to get open access. We are not happy that we are not going to get open access, but we are realists and so we say, "Give us something that is not the bad-faith bargaining test and that is not open access. Give us something in the middle."

Our clauses (a) (b) and (c) are our attempt to get to the middle ground. This is a most reasonable position being put to you by the United Steelworkers of America, a most reasonable position, and we cannot for the life of us understand why the Liberal Party and the honourable minister and his advisers and his deputy are trying to finesse the issue. We are not silly. We do not understand why they are trying to finesse the issue.

If they said to you before this committee that clauses (a)

(b) and (c) are fundamentally different from bad-faith bargaining, then they should have brought jurisprudence and reasons to show you that they are different. They are not, and they know they are not. They know it. We are saying, please give consideration to our suggestion and say that bad-faith bargaining opens the door but so does a failure to adopt fair and reasonable positions; so does the appearance to the labour board that the parties are unlikely to enter into a first agreement; either party. This union can foresee the possibility that it will be the employer, faced with a powerful union which has just organized it, that will come before the labour board and ask the labour board to impose a first agreement that it believes will be better than the one the union will eventually be able to negotiate. We understand that.

This language will be used against us. We know that. We are saying that even though we know that, even though a powerful employer may respond negatively to the language and that a weak employer may come in to seek the assistance of the language, let us end first-agreement strikes in Ontario. They are a blemish. Let us end them and let us allow the parties to come before the labour board and prove either bad-faith bargaining or failure to adopt fair and reasonable positions or a probability that the parties will not likely enter into an agreement within a reasonable time. If we can prove that, if the labour board concludes that, then we will not have first-agreement strikes.

Mr. Gordon: I think it is particularly significant that a union that represents many workers who are making less than \$10 an hour should be here today to talk about this issue. I found it rather refreshing, Mr. Gerard, when you pointed out the fact that you want to be a union first, and if you are going to be a union, then you are there to bargain for workers, and you are not looking for a pansy way out of finding a first agreement.

Mr. Gerard: Jim, you know the steelworkers are not pansies.

Mr. Gordon: That is right. Exactly. I do not believe for one minute that responsible unions in this province want to give up their opportunity to do what they were set up to do; that is, to negotiate. They take pride in being able to hammer out an agreement. Second, you raised a point with regard to the alternatives that are left for unions when they cannot achieve a first agreement. The situation is that people have signed cards and as a result of signing those cards a union has been formed, and if no negotiations are going to go on because the employer is recalcitrant or refuses to negotiate in any way, shape or form, you cannot leave those workers in the lurch. You cannot walk away because if you do, you will never sign up any cards anywhere else; therefore, you are not going to be much of a union. You are not even going to be a union.

That is a point that is perhaps not understood by some members of the public and some MPPs. When there is a long strike as a result of the fact that there cannot be a first contract--we have seen them in this province--it is because you have to stand up for those workers and you must stand up for those workers. That is fundamental. If we want to talk about people supporting various

ideas, we could also talk about Pope John, who said workers have the right to organize and if they cannot achieve a first contract, their right to organize has been taken away from them. That is a basic human right.

Another point we have to realize and think about in this province is the fact that the majority of workers who are unorganized in the province today, even across Canada, are women. You brought up another interesting point, Mr. Gerard. That is, if the workers cannot achieve an agreement, then those workers quite often do not have the economic wherewithal to hang in there for very long. Since most of the workers today who are unorganized are women, who are underpaid and making much less than men, these people are really left in the lurch.

The points you are raising here today are very fundamental. They go right to the heart of the matter. On the points your counsel has raised with regard to bad-faith bargaining--correct me if I am wrong--what you are saying is that if points 2 (a) (b) and (c) are left in that manner, what you foresee happening is that a union such as the steelworkers or some other union could go to the labour board on these points and it could drag on interminably for months attempting to prove this kind of point.

I wonder whether you would expand on that a little further, Mr. Gerard. I am not involved in unions but I would like to know what examples you could give us of cases where going to the labour board has dragged on for months. That is important and it should be on the record.

11 a.m.

Mr. Gerard: I will have our counsel do that because he deals with it.

Mr. Gordon: That is where he makes his money.

Mr. Gerard: That is where he makes his money. Brian is on the full-time staff of the union and he will make money whether he is with us at the board or not. He has all kinds of things he could be doing more important than that.

Let me just say a couple of things. First of all, on Mr. Gordon's point about organizing, Mr. Paris, who is with us today, is our organizer in Toronto. In the last year he has organized 26 units in the Toronto area. I do not think I am far out of line if I say there were not any where the average rate was higher than \$10. If I said the average rate was \$5 or \$6, I would be closer.

Mr. Paris: Say \$4.50, \$5, \$6.

Mr. Gerard: You take those people and ask them to make an economic decision without ever having had the benefits of the union. The reason that employers force that economic decision rather than simply signing the card is that they know most people have a hard time making that decision. Strikes are not an easy decision either, whether you are working at Inco, Stelco or anywhere else. You have to decide to give up your livelihood and

mark that X down. That is not easy to do. Therefore, your point is right: that is where we are in that real economic difficulty.

As to how long it takes at the labour board, the examples just keep coming, but the example that is probably the most unbearable is Shaw-Almex Industries Ltd., a little organization in Parry Sound. It is not a first agreement, but we have been at the labour board for close to two years just to do the bad-faith tests; we are close to two years. Those people have been on strike for almost three years, and as a result we spent two years trying to get decisions at the labour board. Therefore, if you talk about a first-contract situation, trying to meet those tests, an employer can frustrate this legislation just by keeping you at the labour board.

That is one example. Radio Shack was a first-contract situation where we were at the labour board for 18 months. Had we had decent legislation or automatic access, we would not have had the Radio Shack strike with all the bad publicity that brought to the community and to labour relations in this province. We have had dozens upon dozens. Brian knows more of the lengthy delays than I do.

Mr. Paris: We organized Rembrandt Jewelry Manufacturing Ltd. at the end of October. We had the first meeting yesterday, only after the union bugged them. That was the first meeting for bargaining.

Mr. Shell: Many of you know that the certification process is very prolonged and that there is an assessment that the board makes as to the voluntary wishes of people who oppose the union. Hearings are scheduled and are adjourned. It frequently takes a very long time. I am sure the Minister of Labour (Mr. Wrye) gave you the statistics that reveal that in an application for certification the period of time from the date of the application until a decision is rendered averages well in excess of four to five months. That is the first time the parties, after they are certified, sit down and bargain.

Bargaining can often take a further four to five to six months before you know whether or not you will get an agreement. Almost a year has passed since people have actually signed membership cards. It is only then that the parties will know whether or not they are going to have an agreement. It is only then that this legislation becomes important.

If the door is so narrow, because it imposes a bad-faith bargaining test, what we are going to find is a further lengthy period of litigation. We fear that at the end of that lengthy period the board is going to say: "We are very sorry, union, but the company has not refused to recognize, the company does not have an uncompromising position, the company has not failed to make every reasonable effort. It has not bargained in bad faith. So get out of here."

When they tell us to get out, that leaves absolutely no alternative but for the ongoing strike to continue. The amendment that we urge upon you will say: "If the company has failed to

adopt a fair and reasonable bargaining position, we will impose an agreement. If the company and the union are unlikely to enter into an agreement in a reasonable time, an agreement will be imposed. If there is a strike, it will end. If there is no strike, there will not be a strike.

Mr. Chairman: We have a list here and I had better stick to it because people are getting anxious; Mr. Mackenzie.

Mr. Mackenzie: I have just two or three comments and I make them to my colleagues in the committee as much as I invite any response. It is a slightly different argument, but it certainly ties into the whole first-contract dispute and that is the problem we are having in terms of time frames at the board in settling disputes. I have raised this, until I am blue in the face, with previous Ministers of Labour and with the current minister as recently, to some extent, as the day he gave us the summary here, Tuesday of this week.

You have to understand that the old saying, "Justice delayed is justice denied," is very true. I do not know anything in this province that is as devastating to a faith in the system and in the laws, the labour laws and justice, as a bitter, lengthy first-contract dispute. I do not know any other dispute that, for new workers, and an awful lot of them are new Canadian workers or women workers, does these two things: One, so destroys their faith in our system, because it is a problem in Ontario; and, two, probably politicizes them. If I were being extremely selfish, I might say it has some advantages. It sure as blazes does it in a hurry when you get into that kind of a situation. It is really a loss of faith, and quite often it spills over to the police because of their involvement and so on.

In the comments on Tuesday, when the minister was running through the bill with us when we were going through subsections 40a(1) and 40a(2), the exact section we are now talking about, I made the comment this was the key to bill and this was where our main problem was. I think it has been underlined today by the steelworkers.

I sat down with the minister on a couple of occasions just a matter of weeks ago with three suggested amendments that are a little different from the ones we heard here today, but in the same field as the changes that could probably bring about an agreement on this bill and are changes I do not think will bring a major reaction from the business community. It is accurate that they do not want the lengthy strikes either.

You have really reached a testing of wills when you get into that kind of situation and there is somebody who just cannot believe his workers have joined the union in the first place, and he says, "By God they are not going to end up with a contract." We do not have to go to Kapuskasing, I understand that union is coming in here on March 27. I use that as an example where it took one week after 1,600 community people turned out for a board meeting to get rid of the old board to get a new contract.

There are cases galore in this province of this kind of

stonewalling in terms of first-contract disputes. I ask all members of the committee, my Conservative colleagues as well as the Liberal colleagues, to take a look at a few of the changes that have been suggested. The Minister of Labour should understand as well or even better than I do, but I am not sure I got through in my arguments for the two or three changes that do not drastically change it. The frustration has got to come and clauses 40a(2)(a), 40a(2)(b) and 40a(2)(c) as they now exist in this bill simply are bad faith, just by another language. I have had some real arguments with the deputy on this and he did most of the talking in the session on Tuesday saying, "That is not really what it means." It does, and we are hearing it underlined here today.

I do not think the changes that are needed are major, but they clearly have to allow the access without proving or without the feeling you have to go to the board to prove a bad-faith bargaining situation. With that, this bill is not going to resolve the situation we have and any immediate good feelings that a variety of people may have over getting a bill like this bill through is going to be defeated very quickly as we get into the same kinds of fights out in the community.

We do not need to. I do not know what we have in a way of presentations to us, but I suspect we are not getting an avalanche of business or business community groups on this. I suspect if they are going to use their ammunition, they are going to use it on pay equity, but I think they see this as a foregone conclusion. The question then is, why not make it right in the first place? It does not take a hell of a lot of change to make it right.

11:10 a.m.

Mr. Gerard: One of the reasons I think the business community is not inundating you with responses is they know exactly what Mr. Gordon said, that a legitimate union, once it signs up its membership, is either going to get a collective agreement or we will strike him for as long as we can hold them out. We have held them out for two or three years; we will not walk away from a unit we have certified. We will do whatever we can to make sure that strike is effective for as long as we can hold it there. They know that, so there is no point in trying to frustrate something that will be to their benefit and eliminate strikes.

Mr. Gordon: I might comment. Have they invited comments though?

Interjections.

Mr. Gordon: Just one comment. It would be similar to abandoning a baby. That is a fact. It would be like a mother walking away from her child while he was completely defenceless. You would be seen as sucking those people in for your own purposes and then leaving them.

Mr. Gerard: Mr. Gordon has drafted a few of our speeches in Sudbury. I remember the one that put the arrow through the corporate heart of Inco. That was a good one. Anyhow, with respect

to what Mr. Mackenzie said, Brian Shell spends a third to one-half of his time for our union at the Ontario Labour Relations Board. We spend upwards of \$250,000 of our members' dues money each year deciding bad-faith bargaining. If there is any union in this country that knows the jurisprudence on bad-faith bargaining it is the United Steelworkers. I am just flabbergasted that the deputy would try to convince you those tests do not amount to bad-faith bargaining. He is a lot sillier than we are.

Mr. Shell: I am wondering, Mr. Chairman, if I could just briefly take the committee through subsection 40a(15).

Mr. Laughren: Before you do that, Mr. Shell, Ms. Smith was your question on--

Ms. E. J. Smith: Just briefly, I understand Mr. Mackenzie's position and see the clear distinction between it and where we are and I assume at some point we are going to get that in one form or another. We are dealing with something different here, which is seen as a compromise. As you point out, we need to look at jurisprudence almost to understand the subtle difference. You present, and Mr. Gordon presents, the kind of thing we are all trying to avoid, a strong union with time on its side using it to create a situation that, as you say, you will not walk away from and so on.

It seems to me that the essence of that is the time factor. I have trouble determining how, if a strong employer can keep fighting on the bad-faith case for two years with the present wording before this bill comes into place, we are looking at this and you are saying, "It is too open to them to do that." Why is yours better? I am trying to get at the jurisprudence here as to why this changes. To me the time element is the element.

Mr. Shell: The time element in the bill is very helpful and we are not going to be critical of it at all. We think the time element is sensible. We are saying under the current drafting the labour board is going to be constrained to conclude that, except where there is clear bad-faith bargaining amounting to clauses 40a(2)(a), 40a(2)(b) and 40a(2)(c), the labour board is going to close the door.

Ms. E. J. Smith: Why not in clauses 40a(2)(a), (b) and (c) in yours? If I were a lawyer, I think I could do just as much with the one you are giving me as the one we have.

Mr. Gerard: He is very helpful and that is why we pay him so much money.

Mr. Shell: First, if you look at clause (a) in ours, it says "bad-faith bargaining."

Ms. E. J. Smith: To me, so do clauses (a) and (c) in the present one.

Mr. Shell: Clause (a) in ours says bad-faith bargaining. period. Clauses (b) and (c) say, "by necessity of interpretation." This means something other than bad-faith bargaining. That is the first critical difference in the drafting.

Ms. E. J. Smith: It says, "Fail to adopt fair and reasonable bargaining." Why is that not bad-faith bargaining? You are the lawyer.

Mr. Shell: The labour board has said that there is no obligation on an employer to adopt a fair and reasonable bargaining position.

Mr. E. J. Smith: Surely I can argue for three years about what is fair and reasonable just the same as arguing what is bad faith.

Mr. Shell: If the employers come and the labour board concludes that they have adopted a fair and reasonable bargaining position then they will close the door. We can still move to clause (c). It says that even if the company has been fair reasonable and even if it has not bargained in bad faith, clause (a) is not triggered and clause (b) is not triggered if the board concludes the parties are "unlikely within a reasonable period to conclude an agreement," then the board could open the door and say, "We think it is not going to be done within a reasonable period of time, and you should be permitted to come before a board of arbitration and have your agreement determined by the board of arbitration."

Ms. E. J. Smith: Let us follow that through. I do not know what is different in some of the wording here; "uncompromising nature," "failure to respond, in clauses (a) and (b)." To me, clause (c) is the element of a reasonable period of time, and that is what I am more than willing to look at and tighten up. We discussed this in our presentation. To me, the essence is time, and that is where the powerful one, be it the union, or be it the employer, can use time to the disadvantage of the other.

Mr. Shell: Clause (c) in the draft does not speak to time. Let there be no uncertainty about that. Clause (c) in the draft of the Minister of Labour (Mr. Wrye) says, "the failure of the respondent to make reasonable efforts to conclude a collective agreement."

Mr. Haggerty: "Conclude" would be time, would it not?

Mr. Shell: It has nothing to do with time.

Mr. Haggerty: It would indicate time to me.

Mr. Shell: It has nothing to do with time. If you look at section 15 of the Labour Relations Act, it says, "make every reasonable effort to conclude a collective agreement." All they have done is say, "We will examine the efforts to conclude a collective agreement." They can ask, "Employer, how often are you prepared to meet?" The answer might be: "We are prepared to meet every day. We will meet every day from nine to five."

Ms. E. J. Smith: I understand what you are saying there.

Mr. Shell: It is not about how long might it take. The

language in our clause (c) deals with doing it within a reasonable period of time.

Ms. E. J. Smith: I am a real amateur in this field of this type of jurisprudence. However, I would like to say something about that reasonable period of time, because I still do not know why you cannot argue about what is reasonable. I am quite happy to agree with you that we should be looking at what is a reasonable length of time. That is the essence of what I see, rather than these other things. We have time spelled in the act here, there and everywhere. I would like to go back to my office and bury myself in it.

Mr. Shell: Those are time limits.

Mr. Mackenzie: May I ask a supplementary on what you have just raised?

Ms. E. J. Smith: Yes.

Mr. Mackenzie: I will be very brief. Earlier in the exchange it got a little heated for a while; Mr. Taylor referred to it. Maybe we have been fooling around. The amendments I suggested were off the record, whether they carry or not, or if we do not get some other amendments on the bill, I am prepared to move them when we get to that stage of the legislation.

If we had a straight time frame, it would be ideal and would resolve one hell of a lot of problems. I believe I heard Mr. Gerard say, "Give us 30 days," or maybe they would accept 45 days, or something. That resolves all of this dispute and I do not think you would have that major an uproar. But it is simply the observation on the discussions we have had with the ministry that they want to use their words, which we see as bad faith, and we have been trying desperately to find some way to soften them a bit. By God, the obvious answer is make it a straight time frame and take all the rest of it out.

Mr. Shell: A straight time frame was a position put to the minister. He said: "A straight time frame means open access after a certain amount of time. It means you waste time and then it is open access." He will not have open access. He does not care about time, but does not want open access.

Mr. Taylor: The board might and you may have to go to your basket clause (d) in order to find them.

Mr. Shell: In the context of the way it has been written in subsection 40a(1), time is not a factor. I do not know what will go faster.

Mr. Taylor: It could be under clause 40a(2)(d).

Mr. Shell: Anything is theoretically possible.

Mr. Taylor: Under (d).

Mr. Shell: If you want to take the potato and throw it

to the board without giving guidance in the legislation--

Mr. Gerard: You can end up with anything.

Mr. Shell: --you can end up with anything before the board and everything will change, depending upon who happens to be sitting on the board.

Mrs. Smith, we are saying if you had a period of time in open access, sure, convince your minister, your Attorney General (Mr. Scott), and your Premier (Mr. Peterson). As we understand it, they are absolutely opposed to open access. We are saying, "By golly, if they are opposed to open access, surely there must be a way to protect their concern that there shall not be open access, and yet allow access to be such that it will deal with the purpose of the statute." That is all.

11:20 a.m.

Ms. E. J. Smith: I would have to look at it all. We have lots of time things in this bill. For myself, I am going to have to follow them through in sequence to see what they say. They say something. I have not analysed what they say is lacking.

Mr. Taylor: We have been told what it says.

Ms. E. J. Smith: From what I have heard, I would have thought there were already some safeguards built in.

Mr. Gerard: I am the person at the United Steelworkers of America who will have to ultimately decide whether we do or do not authorize strikes--

Ms. E. J. Smith: You have said you will stay out forever.

Mr. Gerard: That is right.

Mr. Haggerty: There is no time limit.

Mr. Gerard: No, there is no time limit. We will stay out for as long as we have to.

Mr. Haggerty: There is no urgency whatsoever.

Mr. Gerard: Let me take you through the point Mr. Shell raised. It is a point I raised in the preamble to our discussion. Fundamentally, we believe the best bargain is the one we can negotiate ourselves.

Mr. Haggerty: That is right.

Mr. Gerard: I think you should remove the strike as a weapon to circumvent the possibility of getting a union in there in a first contract situation.

Mr. Mackenzie: It is establishing the union.

Mr. Gerard: It is getting established.

The position we have taken, and the one we have tried to discuss with people, is if you cannot reach a collective agreement, you exhaust the process and you must strike. Then within 30 days of that, if you cannot come to an agreement, you establish a board. In effect, what that does is to put more pressure on the parties to conclude their collective agreement before the strike, because if you are going to have a strike, it is not going to get either the company or the union anywhere. If you both have the nerve to go out on strike for 28 and 30 days, then you can rest assured that we will impose an agreement on you.

In the industrial relations framework, nine times out of 10, that in itself, will eliminate and force the parties to reach a bargain before a strike starts, but when it is open-ended, and I agree with your point about some time frame, if the employers and their counsels can start to use the inadequacy of the Ontario Labour Relations Board to keep the thing rolling, then that again is subversive.

You should remember what Mr. Shell said. We came here with the understanding that there are some unbending positions. We are trying to be a responsible and reasonable trade union, but again, rest assured, we would much rather have the kind of thing Mr. Taylor started to talk about in first contract than the kind of thing you are now talking about.

It seems to me that if all these parties, who seem to have the same idea, want to eliminate first contract strikes, but keep in mind, and I am speaking for the steelworkers, but I am sure I can speak for most of the labour movement on the issue, a responsible union wants to negotiate its own deal with the employer because we are the one who has to live with the employer. There is no point in having something imposed that we will be fighting about for two years.

Ms. E. J. Smith: That is the other thing I was interested in. I think part of the problem we at least have to be considering here is whether the process we used in the first instance contributes to just postponing the problem till the second contract, or whether we have to iron out some of the wrinkles at the very beginning.

Mr. Mackenzie: (Inaudible) a little more than two years to get a little more time to establish (inaudible) not all of it.

Ms. E. J. Smith: I realize that. Even so, I gather that in some provinces there is a heavy history of second contract strikes.

Mr. Mackenzie: You have to balance that against those who did not strike in the first place because of the legislation.

Mr. Chairman: Can we hear from Mr. Taylor and Mr. Johnson and then move on to subsection 40a(15), which I think Mr. Shell wants to get to.

Mr. Taylor: Perhaps you can clarify it, Mr. Chairman, or maybe both you and Mr. Shell can. As I understood our review of this section with the solicitor, the deputy minister and the minister, there are two situations. I am talking about subsection 40a(2). An application can be made to the board for arbitration--never mind what the situation is. Let us not talk about bad-faith bargaining or anything else. The board has a discretion to either grant or not to grant arbitration.

Under certain circumstances, the board would be mandated to grant arbitration. Those circumstances are enumerated in clause 40a(2)(a) to clause 40a(2)(d), inclusive. There are two situations, but in all cases there is a discretion on the part of the board to grant or direct arbitration, except that this discretion became obligatory where you had those circumstances enumerated in clauses 40a(2)(a) to (d), and clause 40a(2)(d) was a basket clause so broad that it could include anything. That is my understanding of the interpretation by the authorship of this bill.

If your interpretation is different, Mr. Shell, I would be pleased to hear from you, because I do not want to be thinking in one vein as a result of our meeting with the author of the bill and the briefing in that regard and then have to deal with a different interpretation by someone like yourself.

Mr. Shell: I do not know who wrote the bill; all I know is what they have written. I do not know what has been said to you, but there is a fundamental principle of statutory interpretation. It says that if you have a list of items, then you have a so-called basket clause. The courts will impose, and any adjudicator will interpret, the basket item in a way that is consistent with the list that precedes it.

If you are saying that there are apples, oranges and bananas in the basket and anything else that the board shall consider is in the basket, in determining what the words "anything else" mean, there is a fundamental, long-standing principle of our common law tradition that says that "anything else" means a fruit. Why does "anything else" mean a fruit? Why does it not include a piglet? The reason it does not include a piglet is that if the Legislature in its wisdom had intended "anything else" to mean "piglet," then it would have said "anything else, including piglet, and not limited to the category of apples, oranges and bananas."

With that basic principle, let us look at the language in subsection 40a(2). It mentions: (a) the refusal, which I have already advised is a bad-faith bargaining test; (b) the uncompromising nature, which is a bad-faith bargaining test; (c) the failure to make reasonable efforts, which is a bad-faith bargaining test and is lifted directly out of section 15; then it says "or (d) any other reason."

You are the labour board. Does "any other reason" include the fact that the employer owns a piglet? No. Clearly it could not mean that. What could it mean? What could the Legislature have meant when it said, "any other reason," having enumerated three bad-faith bargaining tests? We will wait a decade before we find out from the courts, but it is my view that it means one of the

unenumerated bad-faith bargaining tests. That is what a court will determine that you meant--not the deputy minister, not the Minister of Labour and not its solicitor, but you, the Legislature of the province. That is what it will determine you meant.

We do not want to spend 10 years in courts figuring out what you meant. We want you to tell us clearly in the bill expressly what you mean, and so we say: "Tell us what you mean. Do you mean bad-faith bargaining? We have written it down, 'bad-faith bargaining.' Do you mean a failure to adopt fair and reasonable bargaining positions? Clearly you mean that."

If the union or the company fails to adopt fair and reasonable bargaining positions, there should be access to a board of arbitration. Say it. You mean that they are unlikely to enter into an agreement within a reasonable period of time? Ms. Smith means that; Mr. Mackenzie seems to mean that. Say it.

So we have said, "There it is." If you want a basket clause, which the minister seems to want, then there is the basket clause; that is all. So when they tell you, "There are two criteria: one is called 'ABC' and the other is called 'D,' and D means absolutely anything at all," it is my view that that is not accurate. They do not know with certainty any more than I can know with certainty.

11:30 a.m.

One day, if you allow this legislation to go through the way it is currently written, we are going to find out from a justice of the Ontario Court of Appeal what it means. A bunch of workers are going to have to pay for their counsel to go there and a bunch of employers are going to have to pay for their counsel to go there. We will have had to go through the Ontario Labour Relations Board, we will have had to go through the Divisional Court, we will get to the Court of Appeal and it will take a decade. Meanwhile, what has happened? Meanwhile, the door has been shut in the face of the union, first-agreement strikes will continue and any number of elections will have come and gone.

Mr. Taylor: You may have misunderstood my request for clarification. I appreciate your interpretation of the enumerated clauses and the ineffectiveness of the basket clause, but I would like you to tell us whether this is the same interpretation we have been given. The interpretation we were given in our briefing, as I understand it, was that the board, in entertaining an application, is free to submit the matter to arbitration or not. This comes out of subsection 40a(2)--never mind the enumerated subclauses.

Mr. Shell: Do you mean subsection 40a(3)?

Mr. Taylor: Subsection 40a(2).

Mr. Shell: Yes. It can direct the settlement by arbitration or it can say--

Mr. Taylor: Without referral to the enumerated clauses.

Mr. Shell: Are you saying to me that somebody from the Ministry of Labour said that to you?

Mr. Taylor: That is my understanding.

Mr. Shell: If somebody said that to you, it is completely wrong.

Mr. Taylor: That is discretionary. In other words, the board would have discretion to submit it to arbitration or not, in general principle. If you have circumstances as enumerated in clauses 40a(2)(a) to (d), then the board is mandated to submit it to arbitration. Is that your understanding of it?

Mr. Shell: No. Absolutely not.

Mr. Taylor: Okay. That is what I want clarified in my mind, because that is the interpretation that I have of this section. Maybe the others will agree or disagree with me, but I did ask a question specifically on this to clarify it in my own mind.

Mr. Shell: With respect, I would be extremely alarmed to learn that the deputy minister had suggested that interpretation. Let me deal with it. To be fair to the deputy minister, I would be alarmed because I am so doubtful he would have suggested that interpretation.

Mr. Taylor: You can read the transcript, okay?

Mr. Shell: Yes. The language says, "and it shall direct the settlement of a first collective agreement by arbitration"; then it goes on to say "where." The ability to direct settlement is conditional upon, "where it appears to the board that...frustrated because of" clauses 40a(2)(a), (b), (c) and (d)." So the criterion is "frustrated" and any of those four clauses. We are saying that "frustrated" should go, period, and the language should be amended to mean clauses 40a(2)(a), (b), (c) or (d) as we have proposed them.

The word "where" makes the authority of the board to direct settlement by arbitration conditional. It is almost as if it said "if." The word "where" is quite similar to the word "if." So if you read it, "direct the settlement of a first collective agreement by arbitration if it appears to the board"--

Mr. Taylor: I understand.

Mr. Shell: I believe that is indeed what the language means, and on this point--

Mr. Taylor: That is why I pursued the questioning of those here: to clarify in my own mind what it meant. They authored it, not I, and I wanted to have that clear.

Mr. Shell: I have already said to you, and I cannot say it more clearly, that it is my view that you and the public are being finessed by the language. We should say in this bill what we

mean. We should not say anything other than what we mean in this bill. If we mean bad-faith bargaining, let us say it. If we do not mean bad-faith bargaining, let us say it. If we mean bad-faith bargaining and some other, less stringent openings, let us say those. That is all we are proposing.

Mr. Taylor: You do not have any argument on that.

Mr. J. M. Johnson: Mr. Shell, I would like to comment on your last comments. I agree entirely with what you have said: Let us say what we want in the legislation.

I am a bit disturbed by drafting legislation that goes to the courts and to the lawyers to make a determination of what they think we intended. I think this in relation to the latest decision handed down by the courts on the Catholic school funding. There were five learned judges who could not agree; three took one side and two took the other. Why get involved in that? Why can we not make it clear?

I say to the minister, let us draft the damn legislation so we can all understand what we are saying. Let us not fight over the interpretation. Let us clarify clauses 40a(2)(a), (b) and (c) especially. There is no question that the committee is not satisfied with the explanations. We are getting one proposal from you people and one supposedly from the minister saying different things.

Mr. Gerard: We would be happy to be here at the same time as him and have a debate about it front of you.

Mr. J. M. Johnson: At some point you should be. I feel it is the responsibility of both business and labour to comment on this bill and tell us what is right about it and what is wrong about it before it is drafted, not after. If they say nothing, then they should not care.

Mr. Shell: I agree with you.

Mr. J. M. Johnson: I also suppose that in the explanatory note, which says, "The purpose of the bill is to provide for the settlement of first collective agreements by arbitration where collective bargaining has been frustrated," "frustrated" would be deleted.

I have one question for clarification. In the draft bill before us it says, "the failure of the respondent to make reasonable efforts to conclude a collective agreement." You were concerned about "reasonable efforts," but then in your draft you have "a reasonable period of time." Do we have the problem with "reasonable" in both?

Mr. Shell: No. Frankly, if you want to put in a number of days, go right ahead. We have said, let the board determine what is reasonable. What is reasonable in 1986 may be different from what is reasonable in 1988. In our view, "reasonable" is 30 days, 35 days, 40 days, 45 days. What may be reasonable to the employer is eight months, 10 months, 12 months, two years.

Mr. Haggerty: It depends upon the employer.

Mr. Shell: Right. What I am saying in our draft is, let the parties come before the board and argue that not enough time has passed or that too much time has passed, and let the expert tribunal decide what is a reasonable period of time. After all, they are the people who know how long first agreements take. They are the people who know how long they take in the trust company industry, in the auto parts industry, in the plastics moulding industry, in the automobile industry or in the retail store industry.

All of that would be relevant to determining what is a reasonable period of time. If it takes six months for a first agreement in a steel plant but it normally takes four months in a trust company, then those differences would be relevant in assessing "reasonable period of time." You could, of course, say 30 days and you would not get an argument from us.

Mr. Lane: Would it be more reasonable to put a given number of days and then have to extend it under certain circumstances?

Mr. Gerard: It depends on where we are applying the "reasonable." As Mr. Shell pointed out, if it is during the collective bargaining process in a complicated industry like the mining industry, the steel industry or a major manufacturing industry, it takes a bit longer to effect the collective agreement if the parties are working at it sincerely.

If you are talking about the point at which you have exhausted that, when you have gone through the bargaining, the conciliation and the mediation and you are now in a strike situation, if you are applying the term "reasonable" there, then yes, you should put a limit on the time you have to exhaust that procedure.

There are two time-limit questions at stake here. If the employer frustrates the ability to get a contract, if he just keeps tying you up at the board--in some situations we have been bargaining for two years before we have exhausted the procedure, and that clearly is not reasonable.

11:40 a.m.

The point Mr. Shell is making is that the board knows what is "reasonable" there. However, once you cannot effect the collective agreement, which is where we are now, where the employer wants to use a strike as the weapon to avoid ever having to deal with the trade union, then you have to look at a reasonable time limit. If you cannot do that in 30 days, then we will get the arbitration board to come and impose one.

The reason for that, as I pointed out to Ms. Smith--and I have spent a lot of time at the collective bargaining table--is that if you know you are going to get the outside force to impose the collective agreement, both sides are scared to death. We would much rather do it to each other than have someone else do it to

us. So if we know that after 30 days, if we do not have our act in gear, someone is coming in to do it for us, we probably will not even strike; we will settle ourselves, because we are both scared of those third-party guys.

Mr. Lane: The point I was trying to make was if there was a given number of days, then the board would have less opportunity to define "reasonable."

Mr. Gerard: No. I think there are two different areas there.

Mr. Lane: There are two sides to it.

Mr. Gerard: The board that deals in labour relations has no problem differentiating. I am going to be candid with you. If you are a legitimate trade union and you are going to negotiate with a legitimate employer; with no sweetheart deals, it is impossible to get a true collective agreement in 30 days in this present system of consulting.

Mr. J. M. Johnson: I have just one last comment. I want a clarification of reasonable effort and reasonable time; and I accept what you are saying. I understood you to say earlier that what you are seeking here is compromise but you realize you cannot get everything you want and you are willing to give some. This proposal you presented in the form of your amendments is not everything you want, but do you feel it would be satisfactory to resolve most of the problems pertaining to it?

Mr. Shell: Everything is open access. The minister says clearly that open access is not in the cards. I do not know why it is not in the cards but whatever reason he has for saying it is not in the cards, we have accepted him at face value. It is not in the cards. We are saying: "Okay. It is not in the cards. We understand that. We live in the real world. This is an alternative that is not cynical and it is realistic. I do not believe employers would have any substantial difficulty with it."

Mr. Haggerty: There are two points I want to discuss with the committee members and the chairman. I think this committee should have a copy of Hansard as soon as possible so we can go back and review the interpretation put forward by the Ministry of Labour. The second matter is that perhaps we are going to get into legal interpretations here and it may be of some assistance to the committee to look to library services to have somebody with a legal mind here to assist us, even in research work.

Mr. Chairman: On those two points, Hansard will be available this afternoon for the Tuesday hearing, the discussion with the minister and the deputy. Second, we have one of Ontario's finest legal minds at the table, Merike Madisso, who will be helping us throughout the hearings.

Interjection.

Mr. Chairman: You thought I was talking about Brian Shell. I see.

Mr. Haggerty: On the other thing, dealing with the principle of the proposed amendment put forward--

Mr. Shell: We would be delighted to come back after you have had an opportunity to review the Hansard and respond to any questions you have at that time. If you would like us to bring forth decisions of the labour board that stand for the proposition that the bill as drafted in clauses 40a(2)(a) (b) and (c) are elements of the bad faith bargaining test, we would be delighted to come back and do that.

Mr. Gerard: We have a roomful of them.

Mr. Chairman: We might just do that and take you up on it, Mr. Shell.

Mr. Haggerty: That was one of the points. I want to deal with subsection 2 and clause 40a(2)(a). If I can recall the discussions on that particular section and looking at the proposed amendment, which seems to be reasonable in this area, the respondent has breached subsection 15. I could never quite understand or it was not clear to me where it said, "the refusal of an employer to recognize the bargaining authority of the trade union." I thought once you had certification, automatically there would be no other alternative but to sit down at the bargaining table.

I believe one of the questions that was raised by myself or somebody else was the reason that section was put in was that there might be two parties looking for certification, but this follows certification, if I interpret this bill correctly.

Mr. Shell: If I could just direct the committee's mind to subsection 15. We have now passed the access problem, and the labour board has now said, "You may go to a board of arbitration or you may, within seven days, have the matter resolved by a specially designated board of arbitration."

Subsection 15 of Bill 65 says, "In arbitrating the settlement of a first collective agreement under this section, matters agreed to by the parties, in writing, shall be accepted without amendment." We agree with that. Obviously, if the parties agree, that is that.

Then it says, "and account may be taken of." We do not understand why the Legislature is directing what account should be taken of. The Ontario Labour Relations Board is an expert tribunal, which knows and ought to receive in evidence from the employer and the union what that agreement will say. The employer will say, "The agreement should say this," and the union will say, "The agreement should say that."

The board, exercising its jurisdiction as an expert tribunal in labour relations, can review and assess what it thinks should go into the first agreement; or the board of arbitration that will be designated can do the same. Why is it relevant to the content of the first agreement whether the parties have made reasonable efforts to reach a collective agreement?

Mr. Taylor: That is the point I raised with when staff was here.

Mr. Shell: It makes no sense. Why are "the terms and conditions of employment, if any, negotiated through collective bargaining," relevant? Who cares?

Mr. Taylor: Unless they are suggesting there should be an element of recrimination, which I think should be absent.

Mr. Shell: I agree.

In our draft, which you have, we said, "In arbitrating the settlement of a first collective agreement under this section, matters agreed by the parties in writing shall be accepted without amendment and account may be taken of all matters as the board or the board of arbitration considers relevant to fair and reasonable terms and conditions of employment under collective agreements."

The employer will say: "Here is a collective agreement that we think is the one that should govern. It is the cheapest, most rotten collective agreement in Ontario and we think that is the one you should impose." The union will say: "Here is the Stelco agreement. It is the best, most wonderful collective agreement that exists in Ontario." In between the most rotten and the best, there is a huge line.

It is our view that in the exercise of its authority, having regard to the industry, the circumstances, the size of the unit and the employer's ability and history, the labour board should say: "We think it should be this one. Not the one you want, union. Not the one you want, employer. This one is fair and reasonable and it is has fair and reasonable terms and conditions."

Or the board might say: "We are going to take this clause out of that agreement and that clause out of this one. We are going to put it together. You guys were not able to do it yourselves, so we are going to do it for you. Now live with this for two years and learn how to get along with each other. If you do not like something we have done, go ahead and bargain an amendment."

The Labour Relations Act permits a union and a company to amend the terms of a collective agreement at any time. After the board has imposed an agreement, if the employer says: "We cannot live with this language respecting promotions. It is driving us crazy and it drives your own members crazy. The language is unworkable. The labour board made a mistake," the company and the union can sit down and they can very easily amend the agreement, by signature.

Mr. Gerard: We have done it.

Mr. Lane: You are saying that subsection 15 should end after the word "amendment," and all the rest is rhetoric.

Mr. Shell: We are saying exactly what we said in our amendment, which you have. We are saying that "account may be

taken of all matters as the board or board of arbitration considers relevant to fair and reasonable terms and conditions of employment under collective agreements."

Why does it say "under collective agreements"? Because that is, after all, what is going on there. The parties are learning to live under a collective agreement. We are saying, "That does it." It is simple and neat. The union will make its argument and the employer will make its argument.

The expert tribunal that spends its life assessing, examining and terminating collective agreements and certifying unions will be able to say: "We think this constitutes fair and reasonable terms and conditions. If you do not like it, company, and you do not like it, union, get out of here and fix it yourselves." They are allowed to leave the room, go to the lobby and say, "Look, they stuck us with article 9, which is ridiculous." The union will say: "You are right, it is ridiculous. Let us fix it." Then they can go and fix it like grown-ups.

11:50 a.m.

Mr. Gerard: Which we have done many times. We had an arbitration case in Elliot Lake at Rio Algom over seniority. With all due respect to the lady arbitrator, I could not fathom what went on in her mind. She came in and stuck us with an arbitration decision on seniority that would probably have ended up with a wildcat strike.

When they got this decision, the company and the union looked at each other and said, "What the hell are we going to do?" We went to the room next door to where we got the decision and we negotiated in our own language. Then we said: "Thanks for the order. Here is your money. We have settled it." We do that kind of stuff. That is why the language our union is putting forward is designed to do what we are talking about at the start: make us negotiate it ourselves and try to prevent a strike.

Mr. Lane: It served a purpose because it got you together.

Mr. Shell: That is right.

Mr. Gerard: We have never taken a chance on a decision like that since. We have settled every one.

Mr. Chairman: Before we get into an exchange with the members and Mr. Shell and Mr. Gerard, it might be appropriate to call on Mike Failes. He is a policy analyst with the Ministry of Labour and does have a clear understanding of what was intended in subsection 2 and subsection 15 of section 40a. Perhaps we could have some comments from Mr. Failes.

Mr. Failes: I do not want to get into a debate, but I want to clarify a few things about which you might be a little off the rails.

First, with respect to subsection 40a(2), there is no

question in the ministry's mind that clauses (a) and (c) are simply a rephrasing of the bad faith bargaining test. That is evident in Eaton's and every other major case. The board always talks about (a) and (c) as being two aspects of bad faith bargaining; however, in the ministry's opinion, (b) is something different.

I am sure Mr. Shell is quite aware that the board has often said that its position under the bad faith bargaining test is not to inquire into the reasonableness of the parties' positions. If there is no reason at all, as Mr. Shell pointed out, that will be bad faith bargaining, but they are not interested in the reasonableness.

In clause (b) the ministry attempted to introduce into this tussle the issue of reasonableness. In fact, if you read (b), it says "without reasonable justification." Not without justification entirely, but without reasonable justification.

Looking at Mr. Shell's proposed amendments, I gather that the same thought has captured his clause (b), where he says, "The respondent has failed to adopt fair and reasonable bargaining positions." We both seem to be talking about the same thing. I think that is what is intended and it is something to be considered; at least that is the ministry's position.

With respect to Mr. Taylor's point, there may have been some misunderstanding about that earlier. The deputy did not mean to imply that the board had complete discretion to impose first-contract arbitration, and in the case of (a) through (d) must impose. The position is that the board would impose first-contract arbitration where the conditions set out in (a) through (d) are met. That is the clarification I wanted to make.

Mr. Taylor: Do you subscribe to the view espoused by Mr. Shell today?

Mr. Failes: Yes, to the extent that clauses (a) through (d) are the criteria the board must consider when deciding whether to impose first-contract arbitration.

Mr. Taylor: There is not that option or latitude that I had understood.

Mr. Failes: Only to the extent that it can be drawn from (a) through (d).

Mr. Taylor: Either you subscribe to Mr. Shell's interpretation or you do not. If you do, that is the end of it. My thinking now is different than it was on Tuesday; maybe somebody else's is different as well.

Mr. Failes: Mr. Shell has some different interpretations of the clauses, but I do believe the clauses are the defined criteria for access. There is not a complete discretion in the board; it is a discretion structured by clauses (a) through (d).

With respect to subsection 15, the minister is interested in

your views on whether something like clause (a) should be included. As the committee noted on Tuesday, it does have an element of recrimination in it. He is interested in hearing your views and Mr. Shell's views on that.

Another point is that it is not anticipated that the labour board will be hearing very many of these cases at all. As you will have seen from earlier subsections, the board will only hear the cases where both parties agree. I imagine that in the majority of cases the employer or the union might be reluctant to have the board hear the case. In those cases, a private arbitrator will hear the case. It is fair to say that most private arbitrators prefer criteria in the legislation. There has been a lot written on that and on the need for criteria for interest arbitration. That was the purpose of putting criteria in there.

Those are the only clarifications I wanted to make. If there are any other questions I can answer, I will be happy to do so.

Mr. Haggerty: I believe the minister indicated, and I have it noted, that he had subsections 40a(2) and (15) flagged. He almost threw out a challenge to the committee to come forward. There could be a working agreement that they would make some changes in that area, to subsection 15 in particular, if I interpret him correctly. He said: "I am leaving it open for you committee members to decide. You may hear some good suggestions for amendments in that area." I suppose we should be sitting here with an open mind on it.

Mr. Chairman: He said his mind had open access.

Mr. Failes: With respect to 15, you are absolutely right. He is concerned about the recrimination element in 15 and he wants to hear what you might think about it.

Mr. Shell: I am delighted to hear Mr. Failes finally acknowledging that clauses (a) and (c) are bad faith bargaining tests. That is very nice. With regard to clause (b), the labour board has expressed its reluctance to examine the content of bargaining. It does not want to do that. It wants to leave the content of bargaining to the parties.

For 15 years, companies and unions have said, "Tell us whether what we are doing, the process, constitutes bad faith bargaining." The board has said only in exceptional circumstances will it examine the content of bargaining. It has not said it will not examine the content of bargaining: it has said it is reluctant to do so in respect to the free collective bargaining model that governs in Ontario. Where the board considers it is appropriate to examine the content of bargaining, it will do so.

Where it does so, it can only ask whether the content of the union proposal or the company proposal is reasonably justifiable. For example, where a company adopts a position during a strike that it will not take back to work some of the people on strike, board members will scratch their heads and say: "Gee whiz. They were prepared to meet, they met and they seem to be making every reasonable effort. They put together a document called a proposed

collective agreement which says A, B, C, D, E, F and G are not coming back to work but the balance of the workers are. The union has said it wants A, B, C, D, E, F and G back."

Faced with such circumstances, board members will ask the question, "Why will you not take A, B, C, D, E, F, and G back?" They will ask, "What is the justification for your position, company?"--or union, as the case may be. If they conclude that the justification is recriminatory or irrelevant, they will declare that to be bad faith bargaining. There is no doubt of that at all.

12 noon

The most recent Eaton's decision by Mr. MacDowell in December 1985 expressed the board's willingness but reluctance to examine the content of bargaining. Clause 40a(2)(b) in the bill that has been put to you is a regurgitation of the phenomenon that the board will in certain circumstances examine the reasonable justification, the content of bargaining.

We say to you it is part of the bad faith bargaining test. Mr. Failes--says they do not think it is. Whether it is or not, stick subsection 40a(15) in entirely as our new proposed clause (a) and say: "If the parties have failed to adopt fair and reasonable bargaining positions, fine. If it appears unlikely that the parties will enter into a first agreement, fine. You can go before a board of arbitration."

On the question of who is going to do this, it is correct that the employer is going to insist repeatedly that we go to a private board of arbitration rather than to the labour board. That is absolutely clear. Subsection 40a(3) requires that the consent of both parties before the labour board will be seized to determine the first agreement. If you go to the labour board, you go free; if you go before a judge, you go free; if you go to a private board of arbitration, you do not go free. You pay 50:50. That is the first reason why the employer is going to say to the union, "Let us go before a private board of arbitration."

The second reason is that it may well be that certain private arbitrators who are experienced in the field of interest arbitration will be regarded by both the union and the company as the appropriate persons to deal with disputes. The very fact that they are selected and are the appropriate persons emphasizes why they are perfectly capable of determining fair and reasonable terms and conditions of employment under collective agreements. After all, the company and the union have agreed to select them.

There are 12, maybe 24, and some have said as many as 40, perfectly competent, accepted, acceptable interest arbitrators. Once we go to one of those accepted, acceptable interest arbitrators, terrific. Let them assess. By the way it is not an individual but a board, so there is a union nominee and a company nominee to guide the thinking of the chairman. Let that board determine fair and reasonable terms and conditions of employment.

Do not, we submit, tie their hands by the kind of recriminatory and limited language of the current Bill 65. Give

them an opportunity to do their best job, and if the parties do not like what they have done, I can assure you the parties will change it. If they do not change it immediately, after two years they are going to sit down to bargain. Do not forget that. After two years, when they sit down to bargain, they are going to tell each other exactly what they like and do not like.

Two years will have afforded them an opportunity to get to know each other, to learn who likes orange juice and who likes coffee, who likes the window open and who likes the window closed, where to keep the window and what the temperature in the house should be. They will have had two years of cohabitation. If at the end of two years of cohabitation they have not figured out the nitty-gritty of how to live with each other, then they have not done what they ought to have done.

This union is committed to work with employers, to figure out a modus vivendi, "How shall we get along with an employer?" We emphasize that we are not in the business of driving employers out of business and causing our members to be laid off and unemployed. That is the opposite of our purpose and the opposite of our business.

Before Mr. Gerard speaks to you again, I would like to emphasize that we are prepared, and would be delighted and honoured, to be called back before your committee to respond to your questions, to appear with the minister, with Mr. Failes, with the deputy minister, with their legal adviser, with their executive officers, with anybody, in order to deal with this matter.

We think it is of primary importance; it will set the pattern for first agreement relationships in the future. It has been a long time coming. All of the parties are committed to it. We should do it correctly. If we do not, it will be wrong and we will be even further behind.

Mr. Gerard: I have a closing remark from our union. Brian said it very eloquently. I have always taken the position that any time I go into bargaining I tell the employer on the first day of bargaining that any two fools can negotiate a strike but it takes a bit of brains and courage to negotiate a settlement. In the history of the United Steelworkers of America, we have negotiated far more settlements than strikes. We also have had a few foolish incidents from time to time.

If we look at that record and at the intent of the parties and the players in the labour relations game, the reason for first contract legislation is to prevent bitter, divisive, disruptive strikes. Mr. Gordon, having spent all those years in Sudbury, put it very eloquently about the United Steelworkers of America. We are not very much different than any other union. Once you sign up a person as a member of your union, you are committed to that person. You do not walk away and leave him there helpless. If we are going to have legislation, it should be clear and unambiguous. It should accomplish the goal we have set out, that is, to eliminate the need for first contract strikes so that the parties can get a fair and reasonable collective agreement to start their relationship.

Mrs. Smith makes a very eloquent point with which I agree. I want to make sure that this committee understands. If we have gone the route of attempting to get an agreement and have not able to and then have had to go the strike route, we would be more than happy to agree that if we cannot effect a collective agreement after a reasonable period of time, such as 30 days, we would deserve to have an agreement imposed on both parties. I reiterate that in the experience of collective bargaining, once you have that option out there, both sides are more afraid of that third party than they are of each other. We think that time limit approach has a lot of merit.

Quite often my friend is not as abrupt as he should be. We have a good idea who drafted this language. I have had enough discussions with the Deputy Minister of Labour to know his philosophy, and that is what is expressed in this language. I remind this committee that the Deputy Minister of Labour does not run this province. You people do and you have an obligation to have the right language. I ask you to think about that.

On the point of who will do the arbitration, the United Steelworkers is the largest industrial union in the province; fairly powerful at the bargaining table but economically very weak. We do not the have a huge fund of money as people seem to think we have, although we are one of the stronger, wealthier unions. A lot of unions have to go the private arbitration route and pay highway robbery fees, such as \$2,000 a day--I do not know if anybody in this room makes \$2,000 a day. If you have to go to third-party arbitration to get an agreement, the arbitrator charges anywhere from \$1,500 to \$2,000 a day. Some of the smaller, weaker unions will have that difficulty. You must leave it so that the trade union will have the option. The corporation will force a small, weak union into that route. Whichever way the parties are going to go, whether it be private or public, should be left to the trade union.

12:10 p.m.

As Mr. Shell said, we would be more than happy to appear before you again to debate and discuss the jurisprudence and some other issues. Apart from myself as director and Mr. Shell as counsel for our union, there are a lot of other interested parties in our organization who will be appearing before you as you travel. Some of you know Andy Lavoie, who used to be from Thunder Bay and is now from Sault Ste. Marie. I should make a request on his behalf because we will be meeting on Saturday, and he has asked me to allow him the opportunity to make a presentation. You will be getting a request by Monday from Andy Lavoie to make a presentation in Thunder Bay.

These are the people out the field, in the trenches, who have to bargain these agreements when we certify them. As you travel through the province you will be hearing from our field staff and our local union officers who have to effect the bargain once we have made the certification.

Again, I thank for the opportunity to appear before you.

Mr. Shell: As a point of clarification, it strikes me that you may not be aware that when the company and union sit down at the bargaining table, there is nothing called "the company" and nothing called "the union." They appear as real live human beings. In 97 per cent of the cases, the company appears through a labour relations lawyer who specializes in bargaining for companies. In the United Steelworkers of America, lawyers do not appear at the bargaining table.

Mr. Gerard: Thank God.

Mr. Shell: The people who appear at the bargaining table are regular, normal people who work in the plant, and who are the representatives of the union on our staff. Andy Lavoie is not just a staff person who happens to be in Sault Ste. Marie and Thunder Bay; he is the person who bargains first agreements. In Elliot Lake, Mr. Gerard was the person who bargained first agreements; not me, and never me.

You must to bear in mind when you hear from management, that although they appear before you and they speak to you, they do not speak to the union. Their management lawyer appears and speaks to the union. It is important to bear that in mind as you assess the nature of first agreement bargaining, and the nature of the representations you are going to be hearing from all the interested parties.

Mr. McGuigan: Mr. Gerard said earlier that both parties fear the arbitrator. It seems to me the smaller companies will most likely be affected by this bill. A number of these people have picked out a particular product that is imported from the United States and decided: "Hey, we could make this product in Canada. we will set up a line just for this one product, and the fate of our company is pretty well tied to this one product." I see this in the farm machinery industry because I come from a rural riding and there is some manufacturing of farm machinery.

Probably the competitor in the United States is unionized, is on a larger scale and has the economies of scale. The Canadian manufacturer says, "With unorganized and nonunion labour we can probably make up the differences in that economy of scale, and the differences in transportation costs."

Those people have a fear or a perception in their minds--and maybe it is wrong--that if they go in front of the arbitrator with their books and say: "We are as modern as we can be within our small market. Here is the market price that we have to meet with this American competitor. We cannot pay more wages," that the arbitrator is going to say: "Oh come on, we do not really believe that. We are going to bump you up here because the United Steelworkers have this great agreement, and you are one of these terrible people way down here; so we are going to strike it in between."

A lot of those people have a great fear that reasonableness will not be applied. It strikes me that our leader and the deputy minister have tried to address that here by saying there is a test of reasonableness and they have laid it out in clause (b).

Mr. Gerard: Let me try to deal with that in several ways.

I am not saying it has not happened. I am still a relatively young person, but I cannot remember the United Steelworkers of America ever negotiating anybody out of business. We have had tough situations where the employer would not open his books, as you say, and took a position that we did not believe. That strike may have invariably hurt the employer and our members beyond recovery.

Sometimes, we cannot do anything to force him to prove to us what he is saying, which is unfortunate, but the fear of the arbitrator should be balanced by the employer coming to the union and saying: "The arbitrator is not going to have to live with this, but the union and I will. Here is what I want to show the arbitrator. Here is why I am saying what I am saying. Here is what you think. Here is why, etc."

Unless there is a breakdown in that communication, our union has generally acted responsibly. We have never been in the habit of trying to put anybody out of business. Our job is to negotiate the best possible collective agreement to improve the livelihood of the members we are privileged to represent. Because we are empowered with that responsibility, that may sometimes mean doing something that the membership does not necessarily like and our union has handled that responsibility well.

Your point brings me to the point raised by Ms. Smith. The deputy minister does not seem to agree but it is imperative that if you have to go the route of a strike, after that strike has started--I keep putting on a time limit of 30 days because 30 days has an important concept in bargaining. It is a month after the contract expires or a month from the deadline that the Ontario Labour Relations Board says, "Here is your strike deadline." It has a important psychological effect. If after 30 days we have not been able to effect a settlement, the company becomes afraid of the arbitrator, the union becomes afraid of the arbitrator, and you are going to send the arbitrator in to settle this. If that is not automatic access, although the minister and the deputy seem to be trying to promote that, it says, "You could not do the mature thing, so we are going to do it for you."

Automatic access is when we say, "We are certified; we do not want to bargain--send in an arbitrator." I suggest that if that ever happened, without having to bargain, we would probably have a worse situation than we now have in the province. With all due respect to the legal profession, we end up with a lot of arbitrators who do not have a damned clue about what goes on in the workplace. If you want a situation, they are your last resort.

Mr. Shell: Could I add something? The question of reasonableness in the draft Bill 65 does not go to the content of agreements; it goes to whether you ever get in. Section 15 deals with the content. There is nothing about reasonableness in your draft Bill 65 except "reasonable effort," which is the recriminatory issue. It is our draft that says, "Arbitrator, do what is reasonable under terms and conditions of collective agreements."

A company may come before the board of arbitration and say, "If you raise our wages by 26 per cent, instead of the seven per cent that we have proposed, you tell us how we are going to run our business." If they are honest and if the books are clean, there is not an arbitrator in this province who is going to impose an agreement that will drive the company out of business. There is not a union in this province, if the company is honest and the books are clean, that is going to insist upon a deal that will drive the employer out of business. There are no workers in the province who will let the union bargain them out of their jobs; that is not what they want.

Mr. Gerard: Let me make one other point of clarification.

Mr. McGuigan: Let me come back before I lose my train of thought. You fellows have a lot more experience in this than I have, as far as labour deals are concerned. Are there ever cases when a union might be certified--"we agree we are going to have a union; it is certified"--but the wages stay the same? Does that ever happen?

12:20 p.m.

Mr. Gerard: Sure it has happened, but we decided that at the bargaining table. There have been times when we have done that. We have a bargaining unit in our union--I will not give you the name, they are currently on strike--that came to the United Steelworkers of America and said, "Please let us join your union." At that time, the employer was trying to regulate what they did on their days off.

They said, "Give us the union so that we have seniority clauses, protection and arbitration agreement procedures, and so that the owner cannot tell me where to buy my clothes, where to shop and how to cut my hair." That might seem far-fetched. I am sure that some of my friends in the New Democratic Party know who I am talking about because we have had a three-year strike going on.

Mr. McGuigan: Has it been a very exceptional case? Has it happened once?

Mr. Gerard: Most employers can afford to pay something. I cannot tell you how many times.

Mr. Shell: As a matter of course, most employers, union or nonunion, will raise wages in accordance with labour market requirements. Normally, most will raise them. As to whether the increase will be more or less than what they would otherwise prefer to do is a matter of bargaining. It is a matter of reasonableness if it goes before a board of arbitration.

Mr. McGuigan: There was a small company in my riding that was making--

Mr. Gerard: Which company is that?

Mr. McGuigan: Turnco.

Mr. Gerard: We will have to go sign them up; they are certainly not paying them.

Mr. McGuigan: What union was at Turnco? Do you know?

Mr. Gerard: No, I do not know.

Mr. McGuigan: I think it was one of the automotive ones; it was not you. This happened about six years ago. I knew a worker there who was getting \$6 an hour. The union said, "Join up and you will have \$10 an hour," and they did. Two years later, the company was broke. The guy is working today for \$5 an hour.

Mr. Gerard: I do not want to get into an argument about that. There are probably a lot of factors why the company went broke, not just labour rates. I am going to say just one thing to you.

Mr. McGuigan: It comes back to my fear. That small employer has in his mind that they are not going to apply the test of reasonableness. You yourself say it was probably a lot of other things.

Mr. Gerard: What you have to remember about the test of reasonableness is that what is reasonable at Stelco may not be reasonable at a place in downtown Toronto that manufactures bedsprings. The way we do things in our union, and the way I am committed to politically because of what I said during the campaign, is that we are going to do things by industry. We have plants in Toronto paying wages that are half those we get at Stelco, Inco, Dofasco and Elliot Lake.

There is the economic climate the manufacturer is operating in, the amount of competition the manufacturer has and the assessment we have made of the collective bargaining development in that operation. He may be paying the maximum we can get out of him. If we go there and say, "Manufacturer, you are making bedsprings that have steel in them; Stelco pays this much when they cut steel, so you pay it," our members will cut our throats.

You people are living in a world, and I am not saying this critically, where what you know about labour unions is what I call the Toronto Sun mentality. It is what you read in the Toronto Sun, and that is not how labour unions deal in the real world. We are there to protect and improve the livelihood of our members. We would not do the kind of thing that employer is afraid of.

Let me go one more step. If an arbitrator tried to impose that kind of settlement and the company came to the labour union, Brian and I and others would meet in the back room with our bargaining committee and say, "Guys, the arbitrator is out to lunch," just as we did at Rio Algom when he gave us a seniority clause that would have shut down the mine.

Mr. McGuigan: In the existing political climate, a union--union A--has a contract in an auto plant. People are quite willing to pay \$18,000 for a Chrysler New Yorker.

Mr. Gerard: Not me; I cannot afford it.

Mr. McGuigan: You should come around Windsor right now.

That same union will move over into a little plant making a product for the farm machinery business, a depressed industry, and will say, "We cannot afford to be beaten here."

Mr. Gerard: It is just not true. We do not answer for those forces. We have to go in. If that little operator of farm equipment is a branch plant of a huge American operation and he has come here to exploit our guys, we are going to put the boots to him.

Mr. McGuigan: Turnco was not; Turnco was a retailer.

Mr. Gerard: I could bring you all kinds of examples of those things. You are talking to me in general terms; I do not know the specifics. If we catch an operator doing that, very candidly we are going to try to kick the hell out of him. We are going to get the best we can.

Mr. McGuigan: This is a retailer who decides, "I will make my own product," and is quite successful for a few years.

Mr. Gerard: I cannot deal with that question because I do not know the specifics.

Mr. McGuigan: It comes back to the perception a lot of people have. They are afraid of this and they are afraid that the test of reason--

Mr. Gerard: I represent 92,000 members in the United Steelworkers of Ontario in some 500 bargaining units. I am not ultimately responsible for those kinds of decisions. Let me tell you, I am elected, and I am not elected to put our members out of work; I am elected to get them work.

Mr. McGuigan: I am also elected for these 20, 30 or 50 guys.

Mr. Gerard: I cannot give you a specific answer to a question that is hypothetical and I know nothing about.

Mr. Shell: I can help only as follows: The arbitrators who know the business of being arbitrators are not dissimilar from the justices of our courts. When parties go before the courts, they expect, and by and large obtain the fairest and most reasonable determination of the dispute that they have.

If one party says, "I do not want to go to the Supreme Court of Ontario because I am worried it will not be reasonable", the only response that those of us interested in the rule of law in the province can say is, "We have determined that those are the people designated by virtue of their expertise, integrity and honesty to assess, determine and judge reasonably.

Mr. McGuigan: I accept that.

Mr. Shell: Many arbitrators--by the way including the former Chief Justice of Canada, Mr. Justice Laskin--are the very people who could be sitting on the benches of our Supreme Courts. All we can say in response is, "Those are gentlemen and ladies whose abilities, judgement, honesty and integrity are such that they are regarded by business and by labour as people who can apply reasonable judgement." That is all we can say.

Mr. McGuigan: I accept that.

Mr. Chairman: Mr. McGuigan, we are now straying into a debate on the whole question of the principle of Bill 65, rather than the contents of the bill. We dealt with the principle in the chamber and we should move on and complete our discussion with the United Steelworkers on the contents of Bill 65, with all due respect to you.

Mr. McGuigan: Can I finish with one more?

Mr. Chairman: One point.

Mr. McGuigan: I am not inflexible on these things. I am trying to educate myself. I accept the fact that a good decision is going to be brought down and they are going to be reasonable. All I am saying is there are a lot of people out there who do not. They look at this bill and say, "My God, they are going to kill us with this bill." The bill speaks to that by saying that a test of reasonableness is going to be applied to it.

Mr. Gerard: Mr. McGuigan, I correct you. The bill does not; our proposal does.

Ms. E. J. Smith: In the end in this discussion, we did reach some understanding on this. I do not see anything wrong with what Mr. McGuigan is saying, that we should make the language of the bill such that it addresses people's fears as well as the realities. I accept the reality of what you say, but in many people's eyes, just as there are bad employers, there are bad unions. You can say to us that you are not going to do this and you are not going to do that, but Mr. McGuigan is saying, "Why not state something in the bill that is reassuring?" I do not think we disagree.

Mr. Gerard: That is why we put the test of reasonableness to you.

Ms. E. J. Smith: I am not taking you on with this.

Mr. Gerard: Just to remind you again, what is reasonable in the chemical industry may not be what is reasonable in the mining industry.

Ms. E. J. Smith: I agree.

Mr. Chairman: Mr. Gerard, Mr. Shell and Mr. Paris, I speak for the committee in thanking you for your submission. It has been thoughtful, and thought provoking as well. We look forward to meeting with different segments of your union as we

move across the province. We attach a great deal of importance to this legislation. We hope that we will hear from your people again.

I take seriously your offer to come back at some point. If the members of the committee feel they would like a further exchange between yourselves and the minister and/or the deputy, we will make sure he is here.

Mr. Gerard: We would be happy to talk about the jurisprudence.

Mr. Chairman: We appreciate and thank you for your appearance here.

Mr. Gerard: Thank you.

Mr. Chairman: For the committee members, we meet again at about 4:15 p.m. Let us make sure we are here on time. For those people who cannot be here, we meet here again at 10 o'clock Tuesday morning. The travel arrangements have been made. Tickets are available. You can pick them up this afternoon, or if you would rather leave it until Tuesday morning, that is appropriate as well.

Ms. E. J. Smith: Is the Tuesday morning meeting primarily an organizational one?

Mr. Chairman: No.

Ms. E. J. Smith: Will there be a delegation?

Mr. Chairman: We will have a delegation before us.

Mr. Haggerty: What time is the flight?

Mr. Chairman: It is 3:40 p.m.

Mr. Haggerty: Will the plans or whatever be handled by the clerk?

Mr. Chairman: Yes, they will.

The committee adjourned at 12:31 p.m.

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STANDING COMMITTEE ON RESOURCES DEVELOPMENT
LABOUR RELATIONS AMENDMENT ACT
THURSDAY, FEBRUARY 27, 1986
Afternoon Sitting



STANDING COMMITTEE ON RESOURCES DEVELOPMENT

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Johnson, J. M. (Wellington-Dufferin-Peel PC) for Mr. Pierce

Lane, J. G. (Algoma-Manitoulin PC) for Mr. Stevenson

Clerk: Decker, T.

Staff:

Madisso, M., Research Officer, Legislative Research Service

Witnesses:

From the Ministry of Labour:

Failes, M., Policy Analyst, Labour Policy and Programs

Individual Presentation:

Dodds, B.

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Thursday, February 27, 1986

The committee resumed at 4:25 p.m. in room 228.

LABOUR RELATIONS AMENDMENT ACT
(continued)

Resuming consideration of Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: The resources committee will come to order. We have with us this afternoon Mr. Bruce Dodds, who has a presentation to make concerning Bill 65. Could you please come up to these seats, where there is a microphone, and proceed? Welcome to the committee.

BRUCE DODDS

Mr. Dodds: Thank you. I have just come from work. I hope the absence of a tie and jacket will not matter. I have prepared some remarks I would like to read to you.

Mr. Chairman: Do you want to proceed through your presentation? Is that how you want to do it?

Mr. Dodds: Yes, I would like to do that and I would be very happy to answer any questions you have.

Mr. Chairman: Good.

Mr. Dodds: This concerns the case of Atripco Delivery Service versus Service Employees International Union and the need for a strong Bill 65 in Ontario. My name is Bruce Dodds and I have worked for Atripco Delivery Service since August 1982.

Atripco is a parcel delivery company employing approximately 70 drivers, bicyclists and walkers in Metropolitan Toronto and its environs. The bulk of these workers own and operate their own cars and trucks and are paid on a commission basis. The bicyclists also earn a commission and the walkers are paid by means of a piece rate. There is a handful of hourly rated employees.

In August 1982 this group began to organize in order to bargain collectively through the Service Employees International Union. To my knowledge, among commission couriers, a group of perhaps 1,000 people in Metropolitan Toronto scattered through several dozen firms, we were the first to undertake this process. A certificate was obtained in September 1984, but to date we have been unable to conclude a first contract. The certificate, which entitles us to union representation, is at present facing an application for decertification.

I was the person who made the initial contact with the

labour movement and I was an active participant in the subsequent eight-month organizing drive and a witness at the protracted certification hearings before the Ontario Labour Relations Board. These dragged on for a year and a half. I was also a member of our negotiating committee and I publish a bimonthly newsletter that seeks to voice the concerns of our group.

Being involved in virtually every aspect of this process for about three and a half years has strengthened my conviction that collective bargaining is crucial to resolving the difficulties that confront workers at Atripco and throughout my industry. It has also served to underline how tough it can be to translate the desire for change and the right to bargain into a decent first agreement.

I have come here today, first of all, to express my support for the aims of Bill 65. By means of the Atripco experience I also wish to illustrate the problems and pitfalls of the bargaining process as we have encountered it in Ontario. By the same means, I wish to point out improvements on the present draft of this bill which would assist Atripco workers in attaining a fair first agreement.

I will outline the general working circumstances that led Atripco workers to seek union representation. Ours is a group typical of our industry. The annual rate of turnover exceeds 30 per cent. Of those who remain, a portion barely hold their own. The bulk struggle with varying success to support themselves and their families and maintain their vehicles. Perhaps 30 per cent are prosperous. I am fortunate to be among that number.

Many of those who leave go to other similar firms in the hope of better prospects. Except for the walkers and hourly rated employees who are governed by minimum wage legislation, there are no paid holidays or unemployment insurance benefits. At Atripco, despite injuries associated with lifting and heavy work, there is no Workers' Compensation Board coverage. A private insurance package is paid for by the workers.

For most of us, a 10-hour day is the norm and longer hours are not uncommon. There is no overtime. As is the case in most commission situations, the income security of all can be threatened by company hiring practices which result in the income pool the workers share being more widely dispersed. Like most unorganized work places, there are no seniority provisions for promotion and there is no real recourse in the decisions of management.

It was from this position that Atripco workers began to organize. Organizing focused on retaining the commission and piece-rate systems, while correcting their abuses and inequities. The process of organizing took a full eight months. There was no fixed place of work and so contacting fellow workers who were spread across two radio frequencies was extremely difficult.

For a long time, we were unable to determine how many people actually worked for the firm. When the time came to submit our cards to the OLRB as evidence of membership, fully 40 per cent of

the cards had been signed by people who had left the firm. Because of the difficulty involved in actually contacting potential supporters, it was necessary for members of our organizing committee rather than the union's professional organizers to spread the word and obtain signatures.

4:30 p.m.

This in turn required an extraordinary amount of trust on the part of the group. All the commissioned employees receive their work from dispatchers and have no fixed daily or monthly income. Most felt that if exposed as union supporters and subsequently denied work, they would be unable to prove that they had been unfairly treated. This feeling of vulnerability has haunted Atripco workers at every stage of the union process. Despite all these problems, we were able to submit evidence of support beyond the requisite 55 per cent in April 1983.

Over the course of the next 14 months, certification hearings took place. Atripco enlisted the services of a prominent Toronto law firm, McMillan Binch, to oppose our application. It took 11 months for the labour relations board to reject the company's position and find in the union's favour. A further delay was occasioned by petitioning against the union by objectors. The petition was rejected as involuntary and a certificate was issued, but not before another five months had elapsed.

These delays were highly detrimental to the strength of our group. Turnover at Atripco continued to alter the composition of the work force, and our support, at a rate of 30 per cent per year. New people were not immediately familiar with the problems of the work, and being anxious to succeed, initially they gave them little thought. They replaced others, generally supportive, whose intimate familiarity with these problems had led them to leave.

Privately, senior people at Atripco have since acknowledged expenditures well into six figures made to save their workers from themselves and the evils of trade unionism. I cannot vouch for the amount, but at the time these efforts certainly made clear to us all their intention, their resources and their resolve. Though the resources of the Service Employees International Union are not inconsiderable, the conception of ourselves as young Davids before Goliath took firm hold in our minds.

I have enumerated the main features of this arduous process so members of the committee will understand what was involved for Atripco workers in simply earning the right to sit down and bargain with their employer. In his introduction to Bill 65 the Minister of Labour (Mr. Wrye) said, "Employees who join a union do so with the expectation that collective bargaining will produce monetary rewards and enhance the quality and security of their employment." This expectation is not an infinite wellspring and persistent frustration of a group's aspirations leads to despair. It was not easy for us at Atripco to sustain the energy for and interest in change that is the lifeblood of every emerging bargaining unit.

It was at this point, late 1984, that we began the contract process and entered into events which will fall within the purview of Bill 65. The minister's introduction to this bill states correctly that "certification has no inherent value unless the procedures which follow the acquisition of bargaining rights ensure both parties a fair opportunity to conclude a first agreement." Our experience with these procedures did not inspire confidence.

The firm was reluctant to negotiate during the daytime. They refused to meet with a committee of more than two workers if daytime sessions took place, citing a shortage of manpower. We had elected a committee of five. In scenes reminiscent of the Paris peace talks during the Vietnamese war, when the participants argued about the shape of the negotiating table, our representative was unable to arrange a first meeting. This finally and unpropitiously occurred under the auspices of the labour relations board with the help of a conciliator. Arrangements for further meetings were concluded only after we agreed to a three-person negotiating committee and fought off the company's efforts to determine its composition.

The tone of our meetings had been established and altered little over the next seven months. The firm refused to negotiate monetary issues of any character unless we agreed to reduce our commission. No increase in the commission split was ever proposed, but benefits, paid holidays, bereavement leave and base salary for the walkers were bargaining issues. The response to all these proposals was negative.

While refusing to discuss our monetary issues seriously, the company demanded expensive new requirements of the drivers. I distinguish them from the walkers and bicyclists in this case. We were to incorporate ourselves, and this was presented as a precondition to any contract. This was an unprecedented stipulation, one we felt was highly unfair, as the labour relations board had seen fit to categorize Atripco workers as employees rather than as dependent contractors. We had waited many months to achieve this recognition.

A loosely enforced policy requiring all vehicles to be painted in the company colours had long existed without consistent or uniform application. The OLRB had earlier reinstated with back pay an employee who was dismissed for purchasing a vehicle in another colour. The company had insisted, as another condition for contract, that all otherwise-coloured vehicles be repainted in company colours at the drivers' expense within months rather than upon replacement. This expense varied, depending on the vehicle, from \$400 to \$1,200.

The minister's introduction to the bill states that "time is of the essence in the trade union's effort to transform the momentum of an organizing campaign into tangible results at the bargaining table." Far from obtaining tangible results, our negotiating committee found itself negotiating, or refusing to negotiate, new and mounting expenses to be incurred by our membership. Bargaining was threatening to reduce rather than enhance our situation.

With our bargaining stymied, another circumstance, which we perceived as most sinister in its implication for our group, was becoming manifest. In the spring of 1983, Atripco purchased one of its competitors, Gopher Express. A year later, an arrangement was reached with the well-known bicycle courier firm Sunwheel, which came to work closely with Gopher. A delivery service called Can-Am, located at Pearson International Airport, with whom Atripco had previously had a delivery arrangement serving airport customers, was purchased shortly thereafter.

Following the first of a series of meetings with the Atripco and Gopher workers, where the benefits of these purchases were prominently heralded, all these firms began to cover pieces of each other's work interchangeably, and Gopher moved its operation into Atripco's premises. Whatever Atripco's legitimate long-term intention was in undertaking these purchases and arrangements, in the short term they served to clearly instruct Atripco workers that the firm could bring to bear an alternative work force, which called into severe question the credibility of our putative strike threat. It also established that the company could afford major purchases while demanding expensive concessions from its workers. Goliath, always formidable, was reappearing as a hydra-headed monster.

Sensing no prospect of further movement, our negotiating committee put the results of our bargaining efforts before the group and recommended rejection. This was done on August 15, and by a solid majority Atripco workers elected to strike if their concerns were not resolved.

Fewer than 50 per cent of those present were employed by Atripco at the time of the certification application two and a half years before. This strike mandate was a testament to the resonance of the union goal among my fellow workers. Although we were anxious about having taken this step, most of us felt that standing up to Atripco would yield results at the table.

In the tense weeks before our strike date, as we all waited hopefully for signs of softening in the company's stance, a letter was sent to all employees with their paycheques. I have appended to my brief a copy of this letter, the legality of which I have been told is unassailable. The letter, signed by the owner, made it plain that "A strike...would most certainly affect the jobs of a great number of owner-operators"--which is the terminology we settled upon for drivers in our contract talks--"and employees presently working with Atripco."

It also stated: "Some of our clients require advance notice in the event of a labour dispute to allow them to move their business to a company where service can be assured. Unfortunately, many of these accounts are our best customers and unless we can insure uninterrupted service, we will have to give notice and relinquish this business."

The word began to spread among the workers, with whatever veracity, that this was being done. Similar information was passed on by the firm's representatives to our committee. For Atripco workers the meaning was unmistakable. If they struck the firm,

their jobs, less of a definable entity than those of hourly or salaried employees, might be lost. Since the firm intended to carry on work otherwise, Atripco workers faced simultaneously the impact of a strike and a lockout.

For our group, this letter precipitated a general collapse. Pervasive fear replaced buoyancy. At the eleventh hour, a provincial mediator brought the sides together. Once again, the firm insisted that incorporation, car painting and the exclusion of money items were its implacable conditions for a contract. In the fire-sale atmosphere occasioned by the sudden weakening of our bargaining position, a tentative contract accepting the company's conditions with only very slight modification was concluded with the company's representatives.

After further deliberation the firm's principals demanded that an extra year be added to the duration of the proposed agreement. Our committee was frightened and split. We settled on the company's terms to a 39-month contract. The committee's recommendation of the acceptance of this deal was not unanimous. On September 23, this tentative contract was rejected by a narrow margin.

Atripco workers, clearly having lost confidence in the ability of their committee to obtain a worthwhile first contract through further bargaining, rejected strike action. By this means did our union efforts drift into the twilight zone of decertification and potential oblivion. Goliath's triumph was complete. Only the prospect of outside help in the form of this bill now stands between our group and the permanent triumph of our employer.

Members of the committee may ask: "What did you expect? A contract delivered up to you without sacrifice?" This question goes to the core of what Bill 65 is all about. Traditional bargaining has always rewarded the strong and instructed the weak that even willingness to endure privation may not be enough. The adversary with the hairiest forearm and the most impressive musculature has long been the sure winner. Recent efforts in this province and a number of others have focused on the undemocratic nature of such a contest.

4:40 p.m.

Our group, like others, was able to prove repeatedly that the bulk of its members wish to be represented by a union. We were able to overcome unusual organizing difficulties, endless turnover and significant delay to preserve our efforts. Because of the nature of our work and the circumstances that confront our workers, however, we are simply unable to successfully undertake a strike against this prosperous employer with alternative manpower resources and a resolve that 70 men and women, many of whom barely know each other, cannot duplicate. This is the David and Goliath nature of our problem, and it is the reason we now turn to others for assistance in asserting our democratic will.

Members of the committee may ask, "How do you know you would lose if you have not gone on strike?" The minister's statement,

which accompanied the first draft of this bill, states clearly that he is not proposing what he calls "a risk-free alternative to the present system." Neither am I.

First-contract arbitration is an uncertain process and no bargaining unit knows for sure what gains it will make. Whatever the imposed two-year agreement might accomplish for such a unit, it must be defended in subsequent negotiations where many of the perils Bill 65 seeks to reduce the first time around will reappear and can only be overcome by the confidence and genuine improvements in the work place that a proper first contract can bring.

My answer to the question "How do you know you would lose if you have not gone on strike?" is this. In Ontario the time has come when a decent first contract, one that addresses the major concerns of the workers and that advances rather than retards their economic condition, ought to be the right of all workers who prove by majority vote that they wish it. The day of the bitter and futile strike as the only means to achieve this end ought properly to be consigned to the past.

With regard to the language of Bill 65, I would like to comment on those areas that pertain to my own experience. Several specific features of the bill meet with the approval of my untrained legal mind.

Subsections 3, 4, 5, 6 and 9, which impose rigorous time limits on the activities of all participants including arbitration panels and the OLRB, are a welcome relief and will help to end the lengthy delays that have so demoralized Atripco workers.

Subsection 19, which allows bargaining units with certificates dated after January 1, 1984, to apply, covers Atripco workers.

Subsection 16 grants a two-year contract and provides in certain circumstances for retroactivity. A two-year contract gives the new bargaining unit a fighting chance to establish itself. Retroactivity offers a measure of protection against unwarranted footdragging in the bargaining process.

One of the major subsections of Bill 65 is, however, of great concern to me. It is my persistent fear that the tentative contract concluded by our negotiating committee under highly unfavourable circumstances and rejected by the workers may be held against us by the labour relations board and that access might be denied under the current wording of subsection 2.

If the David and Goliath power inequities that have dominated the bargaining relationship between Atripco workers and their employer go unrecognized, the OLRB might conclude that the signing of this tentative contract precludes any contention, for example, that the firm may have adopted an uncompromising bargaining position without reasonable justification, as set out in clause (b), or that it failed to make reasonable efforts to conclude a collective agreement, as set out in clause (c).

In any case, in its present form subsection 2 poses a hurdle for us, the surmounting of which is not assured by simple proof of an inability to negotiate a first agreement, which could penalize Atripco workers for their earlier attempts to do so.

Accordingly, I want to point out to the committee that the interests of Atripco workers would be best served by less onerous access provisions that would confer a contract on any bargaining unit and employer who are unable to negotiate a contract within a set period of time. In my experience 60 to 90 days is sufficient time for this to be achieved if both parties are serious. The "dance of the seven months" that was our lot in the contract bargaining was ultimately but a prolonged prelude to failure.

I thank the committee for this opportunity to convey my concerns. The struggle of small groups like our own generally takes place in great obscurity. I hope the experience of Atripco workers will contribute to the quality of your deliberations and that Bill 65 will ensure that fair and equitable first agreements become a right in Ontario.

In order not to malign my employer unduly, I have appended a copy of his letter which I quoted from.

Mr. Chairman: Thank you. That is a most articulate presentation. I have already had indications from a couple of members that they would like to have an exchange with you.

Mr. Mackenzie: My question will be very brief. I congratulate you, Mr. Dodds. I was not even aware of delays in your efforts, and I thought I had run into about 95 per cent of the organizing drives in Ontario. I wish we had had them during the estimates when we outlined a number of cases. Yours is not a lone battle.

The tragedy, if I am using that word properly, of this brief is that it points out all the problems we are having with the time frame. When you get into a two-and-a-half-year battle as we have here, you have some idea. I hope all committee members recognize that the Atripco situation is not alone--one or two were mentioned this morning--but it is especially difficult where it is a smaller and a more difficult group to organize.

Your request--and this is obviously my own bias--is a reasonable one and it is what this committee debate is all about. A number of people have indicated that the most serious problem is access. I think this will continue. I feel a little more hopeful that we may be able to do something about that in the course of our negotiations. I hope I am not wrong.

Unfortunately, while Bill 65 will assist you people tremendously, it will not resolve all of the delay problems. That is another battle, and I do not want to mislead you. Once you are certified, it would certainly make it a little easier to get a contract, but the six months or more of organization and the months that you went through attempting to negotiate are symptomatic of some of the problems we have with unions in Ontario.

Other than that, we are going to get a bill. Whether or not it is adequate is another matter. There is something wrong if your brief does not cause every member of this committee to stop and think for a couple of minutes about why we have this kind of legislation before us. I have nothing in the way of a question. I understand the frustration from personal experience.

Mr. Lane: This reinforces what we heard this morning, that the bill should say what it means. In other words, we should be sure that the right wording is there so we understand what it is saying. For example, these people have gone through all of this turmoil which would not have happened had the bill been in place and properly worded.

I am a little confused about a number of things here, one is that there is no workers' compensation.

Mr. Dodds: Ninety per cent of the people in our group are drivers of their own vehicles and are classified as self-employed for taxation purposes. The details of this are not entirely clear to me. What did become clear to me in our negotiations was that the main thrust of this effort to make us all incorporate was to bring the potential weight of the workers' compensation responsibility on to the drivers rather the firm.

Mr. Lane: This letter is written to all owner-operators or employers so the company treated everybody as owner-operators and that is why there was no compensation.

Mr. Dodds: They referred to everyone as owner-operator, but, as I said, only about 85 per cent of the people are.

Mr. Lane: My understanding was that if you hired any help in any type of work, including farming, they must be covered with workers' compensation.

Mr. Dodds: When I refer to our industry, I am referring to commission couriers. There are a large number of firms that essentially compete with the mail services on overnight deliveries that are a different ball of wax. Some of the firms that are competitive with mine have workers' compensation coverage; most do not.

Mr. Chairman: I think Mr. Lane is referring specifically to Atripco where there are 15 per cent who do not own their own vehicles.

Mr. Dodds: I am not aware of any coverage. If there is, I do not want to slander my employers, but I have been involved in lengthy negotiations.

Mr. Lane: It seems to me that for those who are classed as employees there would have to be statutory holidays, workers' compensation and various other protections as with anybody who is hiring help in this province.

Mr. Dodds: They are covered by the minimum wage legislation in the Employment Standards Act.

Mr. Lane: We have two groups of people here: the owner-operators and the employees.

Mr. Dodds: In fairness, it should be pointed out in my brief that the Ontario Labour Relations Board had some weighty issues to ponder when they considered our application. I would not suggest that this was something it would have breezed through in the course of the day. It was a mixed group and in the end the board's deliberations were that that we would go on together.

Mr. Lane: I can certainly see why you are frustrated and why you wanted to talk to us. I for one would like to see the matter corrected and hope the new bill will eventually do that for the next group that is suffering in the way you have.

4:50 p.m.

Mr. McGuigan: I too wish to congratulate the witness on his presentation. Have any of those employees had an accident reported to the Workers' Compensation Board? I agree with Mr. Lane that they are covered although the company is not paying premiums.

Mr. Dodds: The people who are classified as--

Mr. McGuigan: Employees.

Mr. Dodds: We all were classified by the board as employees. Do you mean the people who are not classified as self-employed for tax purposes?

Mr. McGuigan: I do not think the ones who are self-employed are covered unless they have personally taken out workers' compensation and are paying their own premiums.

It is my belief that the other people who are working are covered by workers' compensation although their employer is not paying the premiums. If an award were given to them, the company would have to pay the award.

Mr. Dodds: I see.

Mr. Chairman: Mr. Failes is a policy analyst with the Ministry of Labour, perhaps he could comment on the whole question of workers' compensation.

Mr. Failes: I am not that familiar with the legislation, but there is a different test for "employee" in the Labour Relations Act; there are different purposes involved. I hate to give an opinion because I do not actually know, but it is quite possible that the two groups are separated. I would think, just offhand that the 15 per cent who have obviously an employee relationship would be covered.

Mr. Mackenzie: Also, a commission or piece work rate can enter into the way the thing is worked out. You would have to go back to the--

Mr. Chairman: They can be covered if they apply themselves.

Mr. McGuigan: It is possible for an employer to do a snow job on them and say, "You are not covered," and if they have an accident they do not report it to the Workers' Compensation Board. Of course, in that case nothing happens.

Mr. Lane: There is a penalty if you are an employer and do not cover your employees with workers' compensation and there is a claim. Not only do you have to make up for the year you did not pay the premiums, but there is a penalty, as I recall. When I was farming I was told in no uncertain terms, "It does not matter what you do yourself, but you have to cover your men." That is some years ago now.

Mr. Haggerty: I hope I am correct in this. I believe that with workers' compensation there are two options: you can go through either the workers' compensation or a private carrier insurance company. You have to have either one or the other.

Mr. Dodds: Upon initiating an employment relationship with Atripco, it was outlined to everyone what policy was available and how much each one of us pays for it.

Mr. Haggerty: He bought the insurance.

Mr. Chairman: Mr. Failes is going to provide us with a more or less learned opinion on this matter and we will send it to you.

Mr. Dodds: I would be very grateful.

Mr. Chairman: The clerk probably has your address.

Mr. Dodds: Yes. If not, I will check with you after.

Mr. Chairman: All right.

Mr. McGuigan: Could he also report to the committee on this?

Mr. Chairman: We will get that next week. There will be an opinion on the record.

Mr. Dodds: There is one other thing I would like to add before my time is up. Before entering into this kind of work, I was a contractor and my previous experience with collective bargaining was with being certified. I had a dozen employees and we were organized by the labourers' union. While I am a proponent of collective bargaining, I also have some experience as a small employer dealing with large unions. In our circumstance, there was never any negotiation of contract. We were presented with a contract which was a standard item in our industry.

While my brief asserts the concerns of our group against a large employer, it is very important that this bill be seen overall as an opportunity for the weaker party to legitimately protect his interests. Had I had access to this kind of process in 1981 or in 1980, I would have felt that some of our major concerns in dealing with the labourers' union--which was not a terrible

relationship, I would not suggest that at all--as a small employer, would have been better satisfied.

Ms. E. J. Smith: I do not quite understand the comparison you are making there. I would like you to clarify it. As a contractor, you were in the construction industry?

Mr. Dodds: Yes, I owned a painting firm.

Ms. E. J. Smith: You were making a contrast that I did not understand. Maybe you can help me.

Mr. Dodds: The thrust of my brief is that the terms of our negotiations were something we were too weak to be able to establish.

Ms. E. J. Smith: Yes, I understand that.

Mr. Dodds: From time to time, for small employers a similar circumstance arises.

Ms. E. J. Smith: They could be the weak party.

Mr. Dodds: Yes, indeed. It is not my feeling that is how things work in general, but that can occur for small employers. The circumstance of being confronted by a strike can be a major problem for a small employer. This bill, which is generally seen as being strongly pro-labour and is, of course, an advance for labour, also ought to be seen as a protection for those employers who can find themselves in a situation quite analogous to the Atripco workers if they are dealing with a very powerful union that fails to recognize some aspect of instability or a weakness in the firm that it has to protect in negotiations.

Ms. E. J. Smith: I am sure you know, as I do, that construction per se is excluded from this because of the situation you have already outlined.

Mr. Dodds: I understand that.

Ms. E. J. Smith: Is there anything in the bill that you would pinpoint from your view, which I support, in that you are looking for a balance here between the strong party and the weak party, considering that on occasion there can be a weak employer?

Mr. Dodds: I am trying to say that many of the aspects of the legislation that are criticized as being strongly pro-labour--

Mr. Mackenzie: --work both ways.

Mr. Dodds: Yes, they work both ways. It is something which less than astute observers in the newspapers and media have failed to recognize and, as a consequence, the bill has been characterized as being pro-labour.

Ms. E. J. Smith: From your point of view, and your reading of the bill, you have drawn points about unions being in a

weak position. Have you come to any conclusions that might be worth noting of how the bill addressed the problem of the weak employer or whether you think the bill is satisfactory in that territory?

Mr. Dodds: The bill addresses the problems of the weak employer in most of the situations where it addresses the problem of the weak bargaining unit. It slashes both ways.

Mr. Mackenzie: That point was made very effectively this morning in the comments of the legal counsel for the United Steelworkers of America.

Mr. Dodds: I regret having missed the other submissions to your committee.

Mr. Chairman: Are there any other questions or comments? If not, thank you, Mr. Dodds. We can debate the words on the paper, but it is not nearly as effective as having someone here who has been through it and knows the problems.

Mr. Dodds: Thank you. It was a pleasure.

Mr. Chairman: I thank the committee members for coming back this afternoon and hearing the presentation. I will see you all on Tuesday morning at 10 a.m.

The committee adjourned at 4:58 p.m.

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Committee

STANDING COMMITTEE ON RESOURCES DEVELOPMENT
LABOUR RELATIONS AMENDMENT ACT
TUESDAY, MARCH 4, 1986



STANDING COMMITTEE ON RESOURCES DEVELOPMENT

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Stevenson, K. R. (Durham-York PC)
Taylor, J. A. (Prince Edward-Lennox PC)

Substitutions:

Haggerty, R. (Erie L) for Mr. Callahan
Polsinelli, C. (Yorkview L) for Ms. E. J. Smith

Clerk: Decker, T.

Witnesses:

From the Society of Ontario Hydro Professional and Administrative
Employees:
Green, B., President
Johansen, K., Vice-President
Brickell, M., Secretary-Treasurer

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Tuesday, March 4, 1986

The committee met at 10:10 a.m. in committee room 2.

LABOUR RELATIONS AMENDMENT ACT
(continued)

Resuming the adjourned debate on Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: The resources development committee will come to order. We are to hear submissions concerning Bill 65, An Act to amend the Labour Relations Act, which basically deals with first-contract legislation.

This morning we have the Society of Ontario Hydro Professional and Administrative Employees. I assume that either Kurt Johnsen or Michael Brickell is here. Would you come up to the table please? Welcome to the committee. We appreciate that you have taken the time to prepare a brief and make your thoughts known to us. Please introduce your colleagues.

SOCIETY OF ONTARIO HYDRO PROFESSIONAL
AND ADMINISTRATIVE EMPLOYEES

Mr. Green: I am Barry Green, president of the society. With me is Kurt Johansen, vice-president and Michael Brickell, the secretary-treasurer.

I thank you for the opportunity to address the committee this morning. We have presented a written brief to you. I would like to run through some of the highlights quickly and allow some time for questions from the committee.

The Society of Ontario Hydro Professional and Administrative Employees represents 6,500 employees at Ontario Hydro under a voluntary agreement. Our membership is made up of many professions, including engineers, scientists, architects, accountants and computer scientists.

The society is also a member of the Federation of Engineering and Scientific Associations, a group you heard from last week. Together with FESA, the society has participated in a coalition representing more than 50,000 employees, which has been lobbying for increased collective bargaining rights for professionals and supervisors currently excluded from coverage under the Labour Relations Act.

Arbitration has long been favoured by professional employees in general, and certainly by the society, as a preferred dispute resolution process in collective bargaining. The arbitration process places a responsibility on those involved to justify their positions before an independent third party, and thereby promotes

reasonable, rational negotiations. For this reason, and because many of our members perform work of an essential nature, we wholeheartedly endorse the inclusion of additional arbitration mechanisms in the Labour Relations Act.

I want to talk briefly about the society's experience in collective bargaining. We currently operate under a form of voluntary agreement containing a recognition clause, a procedure for joint consultation and negotiation on working conditions, provision for binding arbitration on salary and some salary-related items, and a grievance procedure that can also lead to binding arbitration.

It is notable that the society has reached negotiated settlements with Ontario Hydro on several occasions, including this past year--a fact that belies the common belief that arbitration will always be used if it is available. The society's experience with arbitration confirms our belief that this form of dispute resolution procedure reduces confrontation and promotes rational approaches to collective bargaining.

While increasing numbers of professional and supervisory employees are seeking collective bargaining rights, two major obstacles have impeded the pace of developments in this area--the unpalatable nature of the strike/lockout scenario and the fear of exclusion from a bargaining unit under the outmoded managerial exclusions clause of the Ontario Labour Relations Act.

FESA has addressed this committee at length on the subject of managerial exclusions. As well, the society has made a presentation to the standing committee on administration of justice hearings, with respect to Bill 7, on the subject of managerial exclusions. In our presentation today, we will deal strictly with the issue of first-contract arbitration.

The strike/lockout scenario is a problem because it is assumed, under the act and under Bill 65 as it is currently proposed, to be the principle and ultimate form of dispute resolution. To most professional and supervisory employees, this appears to be contradictory in an act that is designed to further harmonious relations between employers and employees.

We accept that some employers and unions favour this process and we would, therefore, favour the negotiating process available under the federal Public Service Staff Relations Act, in which both the conciliation-strike and arbitration routes are available to employees upon request at the outset of bargaining. In our view the introduction of this dual track approach into Ontario's legislation would accommodate the needs of a much broader range of employee groups.

Canada's and Ontario's labour scenes have been marred recently by long and bitter fights over recognition and first contracts. Eaton's and the Canadian Imperial Bank of Commerce Visa Centre are the most vivid examples of this. We are, therefore, pleased to note the agreement in principle among all three political parties on the necessity for this legislation.

Some of our own colleagues in FESA have experienced long and difficult negotiations ending in strikes because this provision was not available or because access was restricted in their jurisdiction. The Association of CAE Engineers and Scientists in Montreal, known as ACES, struggled for seven years to achieve a first collective agreement. While the arbitration of such disputes is possible under the Quebec Labour Code, it must be sanctioned by the Minister of Labour and is not commonly available.

The Society of Professional Engineers and Associates, known as SPEA, at Atomic Energy of Canada Ltd., became the first professional group to certify under the Canada Labour Code in 1974. Again, arbitration is possible under the federal code but must be sanctioned by the Minister of Labour. When negotiations for a first agreement broke down, SPEA attempted to resolve the outstanding issues through arbitration, but was unsuccessful and eventually had to strike to achieve a first collective agreement, a situation somewhat analogous to that of the Visa workers.

Therefore, we strongly support the intent of Bill 65 and believe that with some amendments that would guarantee access to arbitration, this legislation will provide an equitable means of resolving disputes. It will help to avoid the confrontation associated with strikes or lockouts in first-contract situations and will aid in establishing more positive relationships between employers and bargaining agents in the province.

The society is supportive of Bill 65 in most respects, as we have specified in the brief. I do not propose at this time to go through a clause-by-clause analysis of the bill. We are particularly pleased with the retroactivity provisions and the two-year term of the settlement as proposed under the bill. However, we have some major concerns, principally with subsection 40a(2) of the bill, as proposed, for the following reasons.

Under subsection 2, the Ontario Labour Relations Board would be empowered to impose arbitration where collective bargaining has been frustrated in one of a number of ways. While this language represents a marginal improvement over the bad faith criterion applied under the Canada Labour Code, it by no means guarantees access to arbitration in every case in which an employer has been recalcitrant in negotiations.

In view of this, we are concerned that rather than providing an impetus to the parties to reach a negotiated settlement, these criteria could lead to a sophisticated form of posturing on the part of employers to avoid the specific identified criteria, create more conflict at the work place and place an even heavier work load on the Ontario Labour Relations Board in the hearing of these applications.

We are furthermore concerned that the possibility of a rejected application will discourage applications from bargaining agents. Applications for arbitration would signal fatigue and drained resources on the employees' part because of the criteria

indicated in the bill. A rejection of the application by the board under those circumstances would be devastating.

10:15 a.m.

Experience with the Canada Labour Code and the British Columbia Labour Code has shown that first-contract arbitration provisions can be meaningless in cases where this provision is not available upon request. With respect to the BC legislation, I note that in the reference to the bad faith criteria, the use of it in a decision by the minister as to whether to appoint an arbitrator is discretionary. Despite that, under the current government in BC, there has been no example where first-contract arbitration has been used in about the past five years.

Our request to make this available on request is not the same as automatic access to arbitration. In our view, the post-conciliation period proposed in the bill is an appropriate time to make the new arbitration provision available. It would encourage serious negotiation in the early stages of bargaining, while at the same time providing for further mediation if required. Therefore, we are convinced these mechanisms will ensure the arbitration provision would not be requested frivolously.

Finally, the proposed legislation continues to assume that the strike/lockout sanctions would remain the primary mechanism for dispute resolution under the Labour Relations Act, even in first-contract negotiations. This is inconsistent with the government's commitment to arbitration in dealing with provincial employees, nurses, firefighters and police. In our view, this assumption also discriminates against the many thousands of professional employees in Ontario for whom arbitration is the preferred method of resolving all collective bargaining disputes.

In conclusion, the society strongly supports third-party arbitration as a rational and effective mechanism for the resolution of disputes. Therefore, we endorse the inclusion of additional arbitration mechanisms in the Labour Relations Act.

Our conclusions with regard to Bill 65 are as follows:

First, legislation to provide for the settlement of first collective agreements by arbitration is long overdue and is welcomed by the society.

Second, while the society is supportive of the proposed legislation in most respects, with respect to subsection 2, we are concerned that the proposed criteria for consideration by the board in determining the necessity of arbitration are open to wide interpretation and do not guarantee access to arbitration in advance of a strike or lockout.

We are therefore concerned that the proposed legislation will not provide the necessary incentives required to encourage recalcitrant employers to conclude first collective agreements with unions in a reasonable and equitable manner. As well, to be effective in promoting harmonious labour relations in the

province, first-contract arbitration provisions must be available upon request following conciliation.

Finally, the society recommends that subsection 2 of the proposed act be amended to the effect that the Ontario Labour Relations Board be empowered to direct that the terms of a first collective agreement be settled by arbitration upon request by either party to the dispute.

Mr. Chairman: Thank you, Mr. Green. That was very succinctly put. Some members want to ask you questions. I think it would be appropriate now to distribute copies of the bill that we have had reprinted. It shows the proposed amendments by the Minister of Labour (Mr. Wrye) so that everybody will know what we will probably be dealing with.

Mr. Polsinelli: Initially, I would like to thank Mr. Green for a well-researched, well-prepared and well-presented presentation. I appreciate your taking the time to bring your concerns to us.

It seems to me that you are calling for automatic access and that is a policy decision cabinet has already made. The government has decided automatic access will not be given under this bill. Instead, we are searching for some middle ground between automatic access and requiring a bad faith test. We attempt to do that through subsection 40a(2) of the bill, where we set out a number of considerations the applicant must meet to gain access to arbitration.

In your presentation you indicate that subsection may lead to a sophisticated form of posturing on the the part of employers, legal wrangles, more conflict in the work place and an even heavier work load for the Ontario Labour Relations Board, indicating the requirements are not sufficient to give an applicant a right to arbitration by the Ontario Labour Relations Board and are too restrictive.

If we accept that the policy decision has been made that there will not be automatic access, and that we definitely do not want the test of bad faith, can you recommend any amendments to subsection 2 that would bring us closer to that policy objective?

Mr. Green: My concern, which I referred to in my verbal presentation, relates to the British Columbia code. I will quote the relevant section. When an application has been made to the board for first-contract arbitration "the board shall give the parties an opportunity to present evidence and make submissions and may consider the extent to which the parties have or have not bargained in good faith in trying to reach a settlement."

The application of the bad faith criteria under the BC code is discretionary. There is no obligation to prove bad faith bargaining as there is under the Canada code. Nevertheless, the history is that clause has been very narrowly interpreted and the result has been that first-contract arbitration is not available in practice.

Not being a lawyer, the way I read Bill 65 is that you have defined in some sense the "bad faith" term. You have put in some criteria for the board to use in judging whether there has been a form of bad faith bargaining under which it would then grant first-contract arbitration. My concern is that it is possible this could be narrower than the BC code, which does refer to bad faith, but in a discretionary way. Therefore, I fear the use of these criteria could become overly restrictive.

Mr. Polsinelli: This section has been interpreted by a number of lawyers who are experts in the field.

Mr. Taylor: Of varying degrees.

Mr. Mackenzie: Some of your own shot you down.

Mr. Polsinelli: The ones we tossed it off seemed to think that they would have access to arbitration without a bad faith test and that this is clearly beyond a bad faith test. In fact, clause 40a(2)(d) indicates that "any other reason the board considers relevant" can be taken into consideration.

10:30 a.m.

Clearly, our government does not want a bad faith test to gain access to arbitration. What I get from your presentation is that your group feels arbitration seems to be the preferred method in all forms of dispute resolution. In our experience, we have found it is better to encourage the parties to try to reach a collective agreement, most importantly in the first stages. In jurisdictions where automatic access is allowed, they have extreme difficulty reaching a subsequent contract because there has been no collaboration and no rapport established between the employer and the employee group. If they have automatic access on the first occasion, subsequent contracts are frustrated and much more difficult to reach.

We feel this legislation is reaching that middle ground where automatic access is clearly not there, but neither is there a test of bad faith. I am sure this committee and the government are anxious to receive any recommendations in reaching that policy consideration. We clearly have disregarded the test of bad faith as well as the other extreme, which is automatic access.

Mr. Johansen: I would like to add a comment to that. We understand the bad-faith test is not intended to be the principle in this legislation. We understand that and believe it is so. On the other hand, despite what may appear to be the case, we do not request automatic access. What we are seeking is some kind of procedure that provides confidence up front to employee groups like ourselves that in event of a breakdown of negotiations for whatever reason, there has to be evidence of considerable effort through two-party negotiations and conciliation and access to services of the ministry and the board. We are trying to find some reasonable common ground that does not equate with automatic or frivolous access.

It would be something along the lines of the following

scenario. Let us say we became certified. If no settlement has been reached three months after certification date, even with the assistance of a conciliator, we would like to be able to apply to the board to settle the matter. The board then would look into the situation and allow another two months to elapse. After that period, the board would look at the situation to determine whether there is any reasonable hope of the two parties settling, with or without a conciliator. Then the board would either settle the matter expeditiously or, if there remained some doubt at that point as to whether the parties could settle on their own, it would allow a further month or two and apply some pressure to settle the matter. If after all that the parties still could not find a settlement, we would expect the board to step in and settle it within a reasonable period of time.

We are talking about a process that would not be anything like automatic access, a quick solution or a short circuit. We are talking about a process that might take five or seven months or more. It is hardly a recourse that we or any other professional employee group would jump at without giving every effort to two-party negotiation and conciliation preamble. That is the kind of deterministic process we would like to see. It is nothing like automatic access, yet it gives us some assurance up front that the board will step in if no settlement is achievable despite all reasonable efforts by both parties.

Mr. Polsinelli: I understand what you are saying. We share the principle you expound that we are trying to find something between automatic access and the bad-faith test. However, looking at the scenario you proposed, if the only factor the board takes into consideration is the time that has elapsed between the ministry's issuing a no-board report and its granting access, whether it be 60 or 90 days, or four or five months that have elapsed, is that not the same as automatic access?

Essentially, my question to you earlier was, what factors other than the mere passage of time should the board take into consideration in determining whether access should be granted? If it is the mere passage of time, then I submit that it is automatic access, only delayed for a certain period of months.

What we are saying is that the board has to take into consideration not only the passage of time but also the refusal of the employer to recognize the bargaining authority of a trade union, the uncompromising position of one of the parties, the failure of the respondent to make reasonable efforts in concluding a collective agreement or such other factors as they deem relevant. If we go with only the passage of time criterion, that is the same as saying automatic access.

Mr. Brickell: We agree that the pure passage of time is automatic. We think it is appropriate to have more assurance that there is a definite end to a process, where you could have some kind of posturing.

Mr. Green: There also seems to be an assumption that arbitration is a no-risk approach. Since 1972, we have had access to arbitration as a dispute resolution mechanism on salary

schedule adjustments; so we have considerable experience with that mechanism. It has been our experience that the threat of arbitration is something that tends to drive the parties towards a settlement.

We have typically used two-party negotiations and mediation in advance of appearing before an arbitrator. On occasion, we have used final-offer selection as the form of arbitration, and that too has been very effective in driving the parties towards a negotiated settlement. That is also a factor that would tend to make parties want to bargain and reach a settlement because arbitration represents a threat to them.

Mr. Bricknell: The distinction between arbitration and a strike/lockout as a dispute resolution mechanism is that if you have an arbitration situation, you have to be able to defend your position to an independent third party. It is not as easy for the employer to say, "That is my position," and for the employee group to say something else while they sit miles apart and argue with each other. If you have to defend your position in a rational fashion to a third party, it promotes reasonableness. That has been our experience.

Mr. Polsinelli: Thank you. I appreciate this interchange.

Mr. Taylor: On that point, would you consider a minimum time period for access? Presumably, both parties would negotiate. Any parties in good faith will attempt to work out their own affairs. That is the best way. That is number one. It is only when that breaks down that you have to bring in a third party. Would you consider a minimum period of time before access, such as 30 days?

Mr. Johansen: That was part of the scenario I tried to describe, that we would not be expecting immediate or automatic access--

10:40 a.m.

Mr. Taylor: You would not expect it to be immediate. If it were immediate, I would suspect bad faith, that you did not want to bargain.

Mr. Johansen: Yes, exactly; and we are not asking for that sort of short circuit. We are at the very least expecting a procedure that provides confidence to those employee groups the legislation is intended to serve that it will be there and that it will be effective.

Mr. Taylor: Have you considered a minimum time that should elapse before you have access by either party? What would you consider reasonable?

Mr. Johansen: I suggested 90 days. There is some precedent for that, but it is debatable; there is nothing magical about that particular time period. However, that would not

necessarily be the end; that would not be the total elapsed time that would be required for settlement.

Mr. Taylor: As long as there are negotiations going on, then the arbitration would not be triggered, no matter how long it took. Presumably it is only when they break down that either party can trigger arbitration.

Mr. Green: There are some time guidelines in the Manitoba legislation, which does give automatic access following time delays. I wonder if I can find the relevant sections; there is reference to "90 days following certification of a bargaining agent"--

Mr. Taylor: It is okay. I just wanted to know whether you had any fixed views on that.

Mr. Green: Beyond the 90 days, there are some additional 30-day periods.

Mr. Taylor: You are flexible on that, I presume.

Mr. Green: Yes. The principle we are stating is that given a time period within which parties who want to resolve the dispute should be able to, arbitration at the end of that time period should provide sufficient motivation for the parties to settle.

Mr. Mackenzie: I am a little concerned about your suggestion that you might have a five- to seven-month period in the process. One thing that is essential is that we be able to reach agreement rather quickly where there is a standoff in first-contract disputes, because that is where the feelings build up. I would like to know whether you think it needs 90 days, assuming we were able to get a straight time period.

Mr. Johansen: If I may comment on the scenario I spun out a little earlier, I was trying to make the point that we were not expecting a quick and easy resolution from the board. We would be willing to live with some process that had a time lapse built into it, which in itself would be a deterrent and would promote settlement.

We would be interested in an expedient resolution, more so than anybody else. Anything less than five to seven months would be more attractive to us, but I was trying to come up with some scenario that built in some compulsion to settle. Obviously, that kind of process and that kind of time delay create problems for the bargaining agent as well.

Mr. Mackenzie: There was some discussion during the presentation of the United Steelworkers of America here last Thursday--it was not one of their recommendations, other than a general statement that a straight time frame would be the best and most direct way to deal with it--that, having gone through the steps, 30 days was an adequate time frame. I am wondering whether you think that would be too short.

Mr. Johansen: Thirty days from which point?

Mr. Mackenzie: When you are supposed to actually start bargaining.

Mr. Green: In the environment we are used to, that perhaps sounds a little short. The previous concern was that if arbitration is too quick, then the parties have not made an attempt to settle and therefore the subsequent concern is with respect to second contracts. In that context, 30 days is perhaps a little short.

Mr. Mackenzie: I also want to commend you for your brief and the fact that you spotted the obvious problem in the bill right off the bat. You have raised only one. Most other groups that have come before us have raised subsections 40a(15) and (17) as at least worrisome sections as well. I think all of them are in agreement that the problem with the bill is in subsections 40a(1) and (2). If we can resolve that to some extent, do you see that as making the bill liveable?

Mr. Green: That is our primary concern. As I mentioned briefly, we support the presentation the Federation of Engineering and Scientific Associations made on the issue of managerial exclusions, which I understand is beyond this bill but which is an area of concern to us under the Labour Relations Act.

Mr. Mackenzie: I want to make it clear to you that to the best of my knowledge there is just about total unanimity in the labour legal fraternity that subsections 40a(1) and (2) are akin to or smack of bad-faith bargaining. Obviously, you have come to that decision yourself. As a matter of fact, I am not sure that all the ministry lawyers are totally on side with the comments of Mr. Polsinelli that it was not bad-faith bargaining, because as it stands now it is almost the same thing.

The other thing you should be aware of is that I do not know when, at least in the 10 and a half years I have been here, a cabinet policy decision has been on the table before a committee like this. The committee makes the recommendations; the government may or may not accept them. It seems to me there may be an opportunity. I think the government has even indicated some willingness to take a look at something somewhat different from what we have before us now. At least I am hoping that is what comes out of these hearings.

It might be useful if you could take the trouble to pass an actual suggested amendment on to us. I know you did not get into that, but amendments were suggested by the United Steelworkers of America in its presentation. Some of us who have had a long-time concern with this legislation have also submitted suggested amendments to the minister, and some of these will undoubtedly surface in our final week when we are looking at the bill clause by clause.

If you have a suggestion, you can get copies of the amendments that have been submitted by other groups. You might check with them and see whether you have a different version. I

think the key to this bill will be whether there is some change to subsections 40a(1), (2) and (3). You might want to take a look at that; it is just a suggestion on my part.

Mr. Green: We will take that under advisement. Thank you.

Mr. Chairman: I want to remind committee members that the bill as presented and the proposed amendments were designed by cabinet, but Mr. Mackenzie makes a good point, that the committee has every right to amend the bill and send it back to the Legislature in amended form. Otherwise, we would be going through an exercise in futility.

Mr. Johansen: That is nice to hear.

Mr. Chairman: I am not saying it will, but there is that flexibility. That is why we are here.

Mr. Johansen: That is our understanding of what third reading is all about.

Mr. Chairman: Yes, that is exactly right.

Mr. Mackenzie: Mr. Taylor and I are going to be on side on a couple of amendments, and we are going to get them through.

Mr. Taylor: You may be right, Mr. Mackenzie. Of course, it is probably for different reasons.

Mr. Polsinelli: Talk about unholy alliances.

Mr. Taylor: Nothing unholier.

Mr. Ramsay: Mr. Chairman, you were developing some of the thoughts I had. I was a bit concerned about the remarks Mr. Polsinelli made. I too was getting a sense that in his opinion maybe what we were doing was futile. In my naïveté, I believed we would have an opportunity to amend this legislation.

It is unfortunate Mr. Polsinelli was not able to be here last week. We heard equal concerns about section 40a from three presenters before us. I thought all of us on the committee shared some concerns about that too. I hope we will be able to move some amendments that beef up that section of the act.

Mr. McGuigan: The Progressive Conservatives used to accept amendments from us.

Mr. Ramsay: That is good.

10:50 a.m.

Mr. Taylor: There was mutuality and reciprocity in the process then.

Mr. Ramsay: I hope throughout the remaining briefs we will hear echoed the words we heard last week from the United Steelworkers of America that unions want to forge their own

settlements through negotiation. They all like this as a safety net at the end, if you will, but that is not what unions really want. Groups want to bargain with their employers but there happens to be difficulty in some cases at the first-contract stage. We are going to have to examine this more closely and perhaps strengthen the guarantees that are going to be open to people. We have heard this message and I presume we shall continue to hear it. You have presented it to us and I have an open mind about it. I hope the rest of the committee members do too.

Mr. McGuigan: Mr. Green, you said both parties have some reason to be apprehensive about arbitration and that final offer selection could be offered. Does the arbitrator have the freedom to say, "Look, folks, I am going to go for one or the other and you had better be aware of that in your position"? Is there no remedy whereby either side could say that is not part of the bargaining position?

Mr. Green: I am not sure whether or not you are referring to our current voluntary agreement with Ontario Hydro, but that agreement calls for arbitration on salaries. That means conventional arbitration. On various occasions, approximately four or five times in the roughly 12 years we have bargained under that voluntary agreement, there has been agreement by the parties to use final offer selection as the form of arbitration. That has been jointly agreed to by the parties; it is not something to which either party individually has had recourse.

Mr. McGuigan: It is not something on which the arbitrator has complete freedom. You are saying that it has been by mutual agreement.

Mr. Green: Not under our current agreement, that is correct. Where we have chosen to use it, it has worked well. It was agreed to this year and it led to a two-party settlement even before conciliation began.

Mr. Brickell: One of the points about final offer selection is that it is just that. If the arbitrator does not like the position that one party, either the employer or the employees, is taking, he has to take one package or the other in its entirety. The fear of having the other side's package taken in its entirety rather than yours means you focus more on the differences; you tend to come closer.

Mr. McGuigan: I realize that part, but what I was trying to get at was this. Say you go to an arbitrator and he says to you, "I am going to settle this by final offer selection." In that case, would both parties say, "That is agreeable," or would they take some further action and say, "That is not within your powers"?

Mr. Green: Under our current agreement, it is not within his powers. It has only been used by agreement of the parties in advance; the parties have agreed before the arbitrator has come in and the arbitrator has been instructed that he is to use conventional arbitration or final offer selection.

Before this bill was introduced in the Legislature, there

was some discussion in the press that final offer selection was being considered as a process by cabinet. I wrote to the Minister of Labour (Mr. Wrye) at the time and indicated to him that it was a process with which we had had some success, that we were familiar with it and thought quite highly of it.

Mr. McGuigan: It might be useful to inquire of counsel whether under the Labour Relations Act, and I am not an expert in that, the final offer selection is at the complete discretion of the arbitrator.

Mr. Taylor: I suspect we have to mandate it by legislation.

Mr. McGuigan: It has to be agreed upon, then.

Mr. Chairman: We could make sure of that. Ms. Madisso could doublecheck on it.

Mr. McGuigan: The other thrust of your presentation seems to favour stretching the period. It seems the ministry is trying to shorten it and use the clauses under subsection 2 to justify that short period. In many cases, we probably will be dealing with this first contract with labour groups that are relatively weak compared to the strength you would probably bring to the bargaining table. Therefore, what you are proposing would work better with a strong labour group than it would with a weak one.

In your situation, the employer would not want to go for six, seven or eight months because he would find that very difficult. In a weaker situation, such as with the Visa and Eaton's employees, they apparently found it pretty easy to go for that time.

Mr. Green: There are two points I would make on that. First, it is not our intent to lengthen the process. Mr. Johansen was responding to the question that indicated a quickly arbitrated settlement of a first contract is not necessarily in the best interests of a longer-term bargaining relationship. In that context, we said perhaps if the process is longer, that would tend to help that relationship evolve during the first-contract negotiations. It is not our intent to inordinately lengthen the process.

Second, it is our intent that within the bill there should be provision for arbitration in advance of a strike or lockout. That would tend to mitigate the problem of the weaker unions because they would not be enduring a strike during this perhaps lengthy negotiating process. They would be in a negotiating mode, but the individual union members would still be on the job and earning a paycheck.

Mr. Haggerty: I have some difficulty in following the brief as submitted by the witnesses this morning. On page 5, it says: "We therefore strongly support the intent of Bill 65 and believe that, with some amendments which would guarantee access to arbitration, this legislation will provide an equitable means of

resolving disputes and will considerably improve the collective bargaining climate in Ontario." On page 7, they go into some detail on it. They have some concerns about the section of the new bill with the included amendments; that would be subsection 3.

It goes on to say: "Experience under the Canada Labour Code and the Labour Code of British Columbia has shown that first-contract arbitration provisions can be meaningless in cases where this provision is not available upon request. This is not to say that we are seeking automatic access to arbitration."

Could I have a further explanation in this area about which you raised some concerns?

11 a.m.

Mr. Green: If I can refer specifically to that bottom paragraph on page 7, our feeling is that first-contract arbitration is provided for under both the Canada Labour Code and the British Columbia code. However, in both cases there is reference to bad faith bargaining as either a mandatory or discretionary criterion the board has to consider before it appoints an arbitrator. In our view, and from the experience we have seen in those two jurisdictions, the first-contract arbitration becomes close to meaningless; it is so difficult to get it applied.

Therefore, our feeling is that first-contract arbitration should be automatic for parties requesting it. We are not saying that should necessarily follow immediately from the certification process. There should be some period during which two parties attempt to resolve the dispute between them, but it should not be necessary for a strike to take place within that time.

The bill, in its present form, says the first-contract arbitration would come following conciliation and possible mediation. We think that is an appropriate period within which to make the first-contract arbitration available. Our concern is that it is not sufficiently clear within the current draft legislation that it will be available at the end of some negotiating process. To us, this still looks like something close to a requirement to prove bad faith bargaining before the first-contract arbitration is available.

Mr. Haggerty: If two parties agreed upon arbitration right from the start--I doubt that would happen; if they were going to take that route, they would follow the procedures outlined in the bill--and say management does not accept the first contract, that is where the problem would start. The minute we put the word "arbitration" in the bill, then there is no inducement to negotiate a settlement or agreement between the two parties.

If we continue to say automatic access and then arbitration, we take away all the rights of the bargaining process. If we do that, we are using a sledge-hammer approach. That is not the intent of the way we want to move. We still want to allow the

opportunity for the two parties to come to that agreement without tying them into arbitration.

Mr. Green: Mr. Ramsay described it as arbitration being available as a safety net.

Mr. Haggerty: It is in subsection 40a(3), if there is no agreement in subsection 40a(1) and then clauses 40a(2)(a) through (d).

Mr. Green: However, it is only under those criteria. If you can prove one of those criteria then it is there. That by no means guarantees it will be there. In our view, the early part of the process, the two-party negotiation and the conciliation, can only take place meaningfully if both parties know that a lack of success during those preliminary steps will result in an imposed settlement that may satisfy neither of them.

The threat of arbitration at the end of the road will make both parties deal with each other in a more meaningful way in the earlier stages. It certainly has been our experience that it works that way. There is compulsion on both parties to bargain to attempt to come to a settlement on their own, or with the help of a conciliator or mediator.

Mr. Haggerty: It does that in subsection 40a(1). It then leads to the third stage, you might say. If there is no agreement, then it goes to arbitration. Finally, the third party will step in and make that settlement or that judgement call.

Mr. Green: Yes, but in our view that should be available automatically. If there is no settlement in the earlier stages, you should not then have to prove there has been some form of bad faith bargaining by one party before you can be sure arbitration will be available to you.

We support that there should be legitimate attempts by the parties themselves, and with the assistance of conciliation services, to attempt to reach a settlement. However, we think those attempts will only be meaningful if both parties know that a lack of success will result in an imposed settlement with which neither one of them may be happy.

Mr. Haggerty: That is one of the problems I had in following this. Looking at it from the bargaining side or management side, looking at it from that area, you might say: "We do not have to worry about anything. We can take a hard line here. We are not going to settle anything, because we know it is going to arbitration. We will let them settle it." Is that what you are saying?

Mr. Green: That is not necessarily a panacea for either party.

Mr. Haggerty: No, but that is the hard line that takes place today. For example, the steelworkers who were here were very strong on that point, saying: "We want that process of bargaining."

We do not want to be forced into arbitration. The strike is our weapon."

Mr. Chairman: If you would permit the chair, perhaps this would be helpful. You could have clauses (a) through (d) under subsection 40a(2). You could have none of those things happening, but still have a strike that lasts two years. You could have a long strike, and none of these things could be invoked. You could say: "They have made reasonable efforts. They are not uncompromising. They simply have not been able to reach an agreement." The witnesses are saying, as have other witnesses, that in that case this first-contract legislation does not work. Do you follow that?

Mr. Haggerty: I am looking at the normal process of negotiation and conciliation, and when that fails, you go to subsection 40a(3).

Mr. Johansen: I ask you not to compare our philosophy on labour relations with that of the steelworkers. For whatever good reason, they have experience with that type of activity; they seem to prefer it. We happen not to prefer it. On the other hand, we have some 12 or 13 years of experience with arbitration in several cases of final offer selection and we feel that that particular procedure induces settlement in many cases. That is our philosophy. You cannot equate that with the view of the steelworkers, who do not want to be driven into arbitration because they have some misgivings about it.

Mr. Green: However, there is a common concern that the process at the end of two-party negotiations or conciliation has to be one that neither party really wants to enter. The steelworkers prefer to use the strike/lockout as that mechanism. Our history and preference suggest that arbitration is better in our environment. The common element in both is that there is something after conciliation that neither party really wants, and the existence of that is what makes the earlier stages in the process effective.

In our brief we referred to the federal Public Service Staff Relations Act, which allows the bargaining unit to request either one of the processes in advance. As they enter negotiation, the bargaining unit has the ability to choose either conciliation followed by a strike or arbitration as the dispute resolution mechanism.

Mr. Haggerty: Who makes that judgement call?

Mr. Green: The employee group has the right to choose. The federal government has decided in advance it is willing to negotiate with each of the bargaining units that are covered by this act by either mechanism. As they enter negotiations for each contract, the bargaining unit decides which of the two routes it chooses.

11:10 a.m.

Mr. Haggerty: You are talking about the federal

government and the provincial government. In the federal government let us take the employees of a postal union. In the railroad they have so many different areas of union members, craft members or whatever; they might have 15 or 20 of them. That is what I am looking at. Your suggestion may work for arbitration when you can ask for it right from the start, because there might have been another procedure or another settlement within that total union. The union has made an agreement and, of course, it follows on through the line in different areas. The railroad has a number of them. Any one of them could put into effect a work stoppage, and this is the threat today with the postal workers. The mail carriers have decided it is their turn to take on the task of getting a reasonable settlement. Of course, they can tie up the whole industry just by one segment of that bargaining unit saying, "This is it."

Mr. Green: I think you are getting into a different issue of the definition of essential services and of who should have the right to strike and who should not. Perhaps that is a separate issue.

Currently in the federal government the employee group has the ability to choose. I brought that up in the context of the analogy between us and the steelworkers. The common part of it is that what is needed is a final step that neither party wants. Under the current draft legislation it is not clear what the final step is. It may or may not be arbitration.

Mr. Haggerty: The legislation is probably broad enough to include every process of the state of the art in bargaining. They are not singling out any one group of union employees.

Mr. Green: No, but no individual group, union or management, knows what is at the end of the road. It may well be in their interests to delay through the early steps and hope that-- If, for example, the employer is hoping to force a strike and the employee group is hoping for arbitration, it would be in the interests of the employer not to bargain meaningfully during conciliation and hope that, when the union makes its application to the board for first-contract arbitration, it is denied as not fitting one of these criteria.

Mr. Mackenzie: I had some difficulty following Mr. Haggerty's arguments, but I think it is useful for the committee to recognize that there is a pretty broad general rule. The ability to use the strike route is almost universally held by the industrial unions and by some of the public sector unions. Most of the professional groups and probably a majority of the public sector, sometimes by legislation, have opted for the arbitration route. Where they are in agreement totally is in terms of what we are dealing with specifically, and that is first-contract disputes.

There is no disagreement on it there, but if you talk to any of the industrial unions--glass, auto, steel, you name it--you are going to get a reaction against the final offer selection or compulsory arbitration. If you talk to a professional group or some of the public sector units, it is a different story. I do not

think we can resolve that; that is a different issue. However, it is almost fundamental in the trade union movement.

Mr. Polsinelli: I want to clear up some of the remarks I made at the beginning and some of the confusion that arose from them.

Mr. Chairman: That would be appropriate.

Mr. Polsinelli: Yes. As I am sure members of the committee realize, this is a government bill and, as such, it has the approval of the cabinet and espouses cabinet policy.

Cabinet and ministerial policy with regard to this bill is that it is not there to provide automatic access, as I indicated earlier, and also that the government does not want the test of bad faith to require access to arbitration. This was clearly indicated by the minister's statement to the Legislature when he presented this bill for first reading. We are searching for something in between, something less than bad faith and not automatic access.

As the government party we are interested in listening to suggestions about how we can improve subsection 40a(2), but at the same time we maintain the philosophy that we want something in the middle, something less than automatic and something less than bad faith, or whichever way you are supposed to say those. I am sure the members understand what I am trying to say.

Once the bill is referred to this committee by the Legislature, the committee can do what it wishes. The majority of the members of this committee can amend the bill in any fashion they wish. They can even choose not to report it back to the Legislature, in which case they would effectively be killing the bill.

When I was talking about cabinet policy and the minister's position with respect to this bill, that is what I was talking about, not about the powers of this committee to amend, delete or not report the bill. I thought I should make that amply clear to our guests today who took the time to make this presentation to us.

Mr. Johansen: That is reassuring.

Mr. Chairman: It is reassuring to the committee, too.

Are there any other comments by members of the committee? If not, thank you, Mr. Green, Mr. Johansen and Mr. Brickell for appearing before us. You have been helpful. The brief was very much to the point.

For the committee members who are coming with us to Sudbury this afternoon, the flight is at 3:40. The taxi chits are in your kit. If it is convenient to pair up, I urge you to do so. Sign them when you get to the airport, put in a gratuity if you wish and so forth. You have to phone first. There is a phone number on

the chit to get them here on time. When we arrive in Sudbury at about 4:30, there will be a van--

Mr. Haggerty: A band or a van?

Mr. Chairman: A van. Sudbury is a friendly town. We are going to Peter Piper Inn and we should be there by five o'clock to get settled in. We are dining at Science North, which is a special dining place for people who like to taste the delights of Sudbury.

Mr. Chairman: Are there any questions?

Mr. Haggerty: Are there any committee meetings tonight?

Mr. Chairman: No, not tonight; but tomorrow morning we meet at 10 o'clock. We have a fairly full day. The new schedule has been distributed to you.

At 10 o'clock we have the Ontario Public Service Employees Union; at 10:45, the United Food and Commercial Workers; and at 11:30, the Sudbury and District Chamber of Commerce.

I hope members of the committee will be able to adapt to this. We want to take a very short lunch and have the airline employees at 12:15. After that we will break, and at 1:45 we will hear from the United Steelworkers of America. A large local is situated there, as most of you know. We then go to Thunder Bay at 3:30. We have to be finished and ready to head out to the airport by 2:30.

Mr. Lane: Are the meetings held at the hotel tomorrow?

Mr. Chairman: Yes. The meetings are right at the Peter Piper Inn.

Are there any other questions?

Mr. Haggerty: How are we leaving from here? Are we going by van?

Mr. Chairman: No. In your kit you have a chit like this..

Mr. Haggerty: That is right. I have that.

Mr. Chairman: Call the number on the chit. I hope you can pair up with someone, but you do not have to.

Mr. Haggerty: I have one ordered for 2:15. That is the time if anyone wants to--

Mr. Chairman: We are going out individually, in other words.

Mr. Taylor: Are you going from here?

Mr. Haggerty: From here, yes.

Mr. Taylor: I ordered one as well and I--

Mr. Chairman: Why do we not adjourn and then you can make any personal arrangements you want to make.

The committee adjourned at 11:19 a.m.

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Publications

STANDING COMMITTEE ON RESOURCES DEVELOPMENT

LABOUR RELATIONS AMENDMENT ACT

TUESDAY, MARCH 25, 1986

Morning Sitting



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Gordon, J. K. (Sudbury PC)

Mackenzie, R. W. (Hamilton East NDP)

McGuigan, J. F. (Kent-Elgin L)

Pierce, F. J. (Rainy River PC)

Smith, E. J. (London South L)

South, L. (Frontenac-Addington L)

Stevenson, K. R. (Durham-York PC)

Taylor, J. A. (Prince Edward-Lennox PC)

Substitutions:

Cooke, D. R. (Kitchener L) for Mr. McGuigan

Gillies, P. A. (Brantford PC) for Mr. Stevenson

Clerk: Decker, T.

Staff:

Madisso, M., Research Officer, Legislative Research Service

Witnesses:

From the Retail Council of Canada:

McKichan, A. J., President

Doucet, G., Senior Vice-President

Reid, P., Director, Personnel Administration, Simpsons Ltd.

From the Ministry of Labour:

Failes, M., Policy Analyst

From the Canadian Organization of Small Business:

Hale, G. E., Vice-President

From the Ontario Nurses' Association:

Alexander, D., President

Nousiainen, S., Research Officer

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Tuesday, March 25, 1986

The committee met at 10:12 a.m. in committee room 2.

LABOUR RELATIONS AMENDMENT ACT
(continued)

Resuming consideration of Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: We have a full agenda today, so I think we should start before the rest of the members get here or we will get behind in our schedule.

For those who have not been here before, the Legislature has charged this committee with reviewing Bill 65, An Act to amend the Labour Relations Act, which is commonly known as first-contract legislation. The committee has been holding hearings across the province. We now are back in Toronto for the duration, and this week and next week we are hearing briefs from interested groups. Towards the end of next week, we will call a halt to the presentations and as a committee will debate the clauses to determine if there should be amendments to the bill and, if so, which ones. After that, the bill will be reported back to the Legislature in the new session, which starts around mid-April. If it passed, will become law of the land some time this year.

This morning we have with us the Retail Council of Canada, Mr. McKichan. I ask him to come to the table with whomever he wants to bring with him and proceed. We welcome you to the committee. We are pleased you are here because we know you represent a very broad section of the retail sector of Ontario. We are glad you are here with us.

RETAIL COUNCIL OF CANADA

Mr. McKichan: Thank you, Mr. Chairman. Let me introduce my colleagues to you and to members of the committee this morning. On my right is Patricia Reid, director of personnel administration for Simpsons Ltd. On my left is Gerald Doucet, senior vice-president, policy, of the Retail Council of Canada.

We appreciate this opportunity to appear before the committee on an important piece of legislation. I will take a moment to describe our constituency and the process whereby our submission was developed. The Retail Council of Canada is both a direct member organization and a federation. Within our direct membership, we represent retailers of all types and sizes who among them perform more than 65 per cent of Ontario's total retail business. We have about 100 affiliate associations of both trade specialty and regional type which represent a further substantial percentage of retail business, which we estimate in the order of another 10 per cent. On a combined basis we speak for approximately 75 per cent in volume of total retail business represented through many thousands of establishments.

The submission you have was developed on the advice of our employee relations committee and has been approved by the executive committee of our board. The employee relations committee, as its name implies, consists principally of specialists in personnel and employee relations with input also from the independent sector. We generally are generalists and do not have specific members of management dealing with that question.

Our first position which I would like to register, although I know the committee is formed to discuss the actual detail of the bill, is that we do not believe the bill will add to the quality of the climate in employee relations in Ontario. While the government has expressed its strong commitment to the bill as a matter of principle, we believe it is never too late to have a reconversion. We would like to record that we believe the interests of employees as well as employers would best be served if this bill did not go forward. Our reason for taking this position is we feel in its present form it is liable to hinder rather than help the collective bargaining process and in particular the bargaining of first contracts.

It is our belief there will be a much stronger likelihood of almost every first negotiation, or a high percentage of them, being hindered because there will be a belief that the award is likely to be better on the part of a third-party imposed award than the terms which the bargaining group can negotiate by itself. Particularly is this so as we believe it is the intention of the bill not simply to deal with bargaining in bad faith, but the definition of the circumstances in which the bill will apply in our view is much wider than that and could take in a whole variety of circumstances which might be construed as undue reluctance on the part of the employer, while it might be no more than a reasonable interpretation of the economic circumstances with which that employer is faced.

10:20 a.m.

Having made that point, I would like to speak in some detail to the specific provisions of the bill; first, to the imposition of a contract for two years. In the other jurisdictions in Canada in which there is similar legislation, the jurisdiction provided for is one year. On the one hand, we believe that is a more realistic approach in the sense that after a year the issues which separated the parties in the first place are still going to be visible and apparent. On the other hand, there is the artificiality of the imposed contract. If it is bad in the first year, it gets worse in the second. It has to be recognized that no one is better able to sort out what is appropriate for particular circumstances than the parties.

Second, we are concerned that the contract, having the possibility of being imposed, can be quite comprehensive. It can touch much more than the basics of any collective agreement. Again, we feel that is wrong. If you admit the principle of first-contract legislation, in reason and fairness it should be limited to the basics of a contract because, again, it is very difficult for a third party to attempt to interpret what is right and wrong in all manner of working arrangements, job duties and so forth.

We have concerns with the provisions dealing with reinstatement in that the provision is virtually for the re-establishment of the status quo; yet in many cases the likelihood is that the status quo will have shifted if a strike has lasted for any period of time. The business, for instance, may have been down-scaled in the interim, either voluntarily or by force majeure. The skills and abilities that were necessary for a certain mode of operation may no

longer be the right skills and abilities. There simply may be a much smaller volume of business so that it is not possible to provide work for everybody who was in employment when the disruption of work started.

The next point I would like to touch on is in relation to subsection 40a(16). We believe the date of retroactivity should not be the date of notice of desire to bargain, but the date of finding of frustrated bargaining. Again, it is just a matter of scale and dimension. If you are going to have the legislation, it seems to us you should attempt to minimize rather than maximize whatever inequity or artificiality it induces.

The last point we make is in relation to the application of the bill. We believe it would be simpler to start with a date from the proclamation of the bill; otherwise, there is a good deal of confusion as to whom exactly the legislation applies.

That summarizes our main points. We will be happy to respond to the questions of the committee.

Mr. Chairman: Thank you, Mr. McKichan. I was a little confused about your last statement of when the bill takes effect. Is that what you were concerned about?

Mr. McKichan: That is because of section 19.

Ms. E. J. Smith: I was confused by that because it seems almost contradictory to the statement made yesterday by Bill Lloyd when he was said it was going to be too late for the group he is dealing with. It is contradictory to something we heard yesterday.

Mr. Chairman: Mike Failes is a policy analyst with the Ministry of Labour. Mr. Failes, can you help us?

Mr. Failes: The section allows an application to be brought by either employer or trade union when the bargaining rights were acquired on or after January 1984; so there is some degree of retroactivity in the legislation. I think that is the point being raised by the delegation.

Ms. E. J. Smith: The point I am making is we did not answer yesterday's applicant, Bill Lloyd, when he said it was not going to come in time for the group at West End, I believe it was.

Mr. Taylor: With respect, I do not know that that was the correct interpretation. With the group he was dealing with, I think it resulted in an application for decertification, so that regardless of when the bill comes in, the bargaining agent is not going to be the bargaining agent any more.

Ms. E. J. Smith: Was he in for decertification?

Mr. Taylor: Yes.

Ms. E. J. Smith: From what he said, I thought in that case it was just going to lapse rather than be decertified. Maybe I am wrong.

Mr. Taylor: For what other reason, I do not think the aspect of retroactivity was the pertinent problem there. I think it was the breakdown in negotiation culminating in an application for decertification.

Mr. Mackenzie: They were already eliminated from the department.

Ms. E. J. Smith: I realize there was the other aspect to it.

Mr. Mackenzie: Mr. McKichan, have you had a lot of direct involvement in union negotiations or first-contract negotiations?

Mr. McKichan: I have never been involved in first-contract negotiations, but I was involved in labour relations about 20 years ago.

Mr. Mackenzie: You have not had more recent or direct contract negotiations then?

Mr. McKichan: No.

Mr. Mackenzie: Are you aware of the waiting of both women and ethnic workers in many of the first-contract disputes that we have had in Ontario?

Mr. McKichan: Yes, I am aware of that.

Mr. Mackenzie: Do you have any clear answers about how to deal with some of the abuses that have been demonstrated, in some cases by court actions, and the difficulty these workers have in organizing to get first contracts?

Mr. McKichan: I would suspect that a remedy based on bad faith would cover a high majority of these cases.

Mr. Mackenzie: Are you aware of the arguments that have been made consistently by every group before us, whether unions or labour lawyers, about the difficulty of proving bad-faith bargaining before the board?

Mr. McKichan: That may be a problem, but it is a problem that could be addressed by procedural matters. I would suggest that one of the most significant weaknesses of our whole process is the certification process itself which, of course, this bill does not address. It seems to me that it is fraught with many more apparent weaknesses than any other part of the process.

Mr. Mackenzie: Would you be sympathetic to the application date being the terminal date in certification procedures?

Mr. McKichan: I think the element which would restore the best balance would be the requirement of a ballot for any certification or some process which would assure the employees' concern that they know what they are voting for and what the implications are.

Mr. Mackenzie: As I voiced before, my concern with that is that there was a time when I was organizing a lot of small plants. I found that the difficulty always came after the notice went up that we had applied. In some 12 or 13 plants in which I personally had a hand in the Windsor area, it seemed that in every single case we had company petitions before the board, which we were usually able to prove. In one case it had to do with the company lawyer. In two or three cases it was the supervision in the company. I found that the pressure on the employees came after the application, and that is why I asked whether you would consider the application date being the terminal date, even if that required a vote. Just out of curiosity, I would like to hear your comments on that.

Mr. Doucet: Are you referring to the date the first contract would be effective?

Mr. Mackenzie: No. I am referring to the date we were talking about at this time regarding certification procedures.

Mr. McKichan: I am going to turn to my colleague, Patricia Reid, for her more recent experience of the procedure. I would be interested in hearing her views on it.

10:30 a.m.

Miss Reid: Mr. Mackenzie, if we go through the due process of certification, the hearings, and whether in some cases there have to be votes, I do not know whether making the terminal date the date of certification has any real meaning. I am aware of some of the questions that come up with respect to petitions by employees, but I do not know that I would support the date of certification being the terminal date.

Mr. Mackenzie: That is exactly my fear, because that is the period of time when the anti-union activities usually begin, when you are trying to organize new units.

Can I ask you about the preamble of the Labour Relations Act? The preamble is fairly clear, "Whereas it is in the public interest of the province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees." Do you subscribe to the preamble of the Labour Relations Act?

Mr. McKichan: It is appropriate when it makes the point that it is intended to induce the facilitation of harmonious relations in the negotiations. It is probably deficient in the sense that it might also include a preamble that it is in the interests of the citizens of Ontario generally to have the option of deciding to organize or not to organize as they see fit. I regret that the preamble to the act does not emphasize that aspect of the labour relations process as much as the harmonization of negotiations once they have commenced.

Mr. Mackenzie: I noted your last paragraph on the first page of your submission, where you seem to indicate that there are a lot of workers who do not prefer to be organized. Are you aware of the procedures under the Labour Relations Act in terms of organizing a new plant: (1) that you have to contact the workers, (2) that you have to get their signatures on cards and (3) that you have to have the money paid?

Mr. McKichan: Absolutely.

Mr. Mackenzie: Is that not an adequate process?

Mr. McKichan: In my view, no, in the sense that I believe a great many employees when they sign cards do not have a realistic understanding of what it is they are doing. Probably the likelihood in many cases is that it is seen as an interim step--as an expression of interest, if you like, in terms of a commercial analogy--after which there will be some more definitive step that will involve the certification. That belief is realistic in terms of what should happen. It is realistic to inject another step between an expression of interest and an actual determination of a position.

Mr. Mackenzie: Do you then agree that it is the employer's right, once that application has been received, to contact the employees and to assist in circulating petitions? Do you not see the power and the fear factors, which were there in every plant I ever organized, in terms of what the company can do to them? They are the ones who are putting their jobs on the line. That is the automatic reaction of workers when they have signed those cards.

Mr. McKichan: If I could be assured that the employees had had it fully explained to them and that they had a full comprehension of what the process was about, I would not be so concerned. In my view, that is unlikely to happen in many cases. It is for that reason I suggest the certification process would be much better accomplished if the employees could have the opportunity to express not their potential interest, but their actual decision, in an entirely neutral environment. It seems to me that the signing of a card cannot be taken as an actual decision.

Mr. Mackenzie: The fact that somebody sits down and talks to them, and in many cases they may request it themselves, does not have a hell of a lot of validity. That is what you are telling us.

Mr. McKichan: Perhaps you would agree with me that what goes on in an informal conversation is open to a lot of misinterpretation, both by the speaker and by the hearer. I suspect that in many cases the actual facts are not understood by the individuals.

Mr. Mackenzie: Are you aware that the vast majority of petitions where there are certification hearings are thrown out?

Mr. McKichan: That may be the case. I am also aware that the preponderance of employees in the province is not unionized and I suspect that the great preponderance of that group prefers not to be unionized.

Mr. Mackenzie: I would give your remarks more credence if you could give me some concrete examples of the pressure that has been applied the other way. I did not get involved in it in the years that I was organizing, but I sure saw it from the other side in almost every application before the Ontario Labour Relations Board. It used to endlessly frustrate Judge Finkelman as well when we were finally able to prove where the pressure was coming from.

Mr. McKichan: I suspect that whatever may have been the case in history, the world has taken another turn.

Mr. Mackenzie: Are you saying it is now easier for workers to organize, given the current climate?

Mr. McKichan: Most individuals now value their freedom and realize the potential difficulty that may be caused by a third-party intervention in their lives. Goodness knows, in all of our lives, the amount of our freedom is relatively limited. To voluntarily sacrifice part of that freedom for a possible economic gain is something that should be weighed and be given the most serious consideration by the individual. He should have the opportunity to make that decision with a very full knowledge of the facts.

Mr. Taylor: Would you clarify the time frame, Mr. Mackenzie? I do not know when you organized, and now we are talking about the present. Mr. McKichan mentioned that he was involved 20 years ago or something. Was it 20 ago years that you were organizing?

Mr. Mackenzie: It was probably 20 years ago. I have also served as Labour critic for seven years, and the thing has not changed one damned bit.

Mr. Taylor: I do not know, but we are getting some conflicting perceptions here.

Mr. Doucet: Could I add a point? On the bill that is before us, Mr. Mackenzie has raised a very important point about the issue of bad-faith bargaining and how it is interpreted. I want to add that one of the problems we have with this bill is precisely that the reasons subsection 40a(2) gives for frustrated bargaining are equally as vague as or even more vague than what we already have on the books.

If you use the term "uncompromising nature" or the term "reasonable efforts," that is one of our problems. If it were clearly bad faith, and bad-faith bargaining were clearly spelled out, it would contribute greatly to harmonious collective bargaining arrangements. These particular clauses--40a(2)(a) to (d) inclusive--contribute to further confusion; they do not contribute to further clarity.

Mr. Chairman: You have put your finger on the clauses that all sides that have come before the committee have had problems with. Before we started this morning, Mr. McKichan mentioned to me the whole question of bad-faith bargaining. I talked to Mr. Failes, and he explained to me that when bad-faith bargaining occurs under normal circumstances, a party can bring an application--Mr. Failes will correct me if I am interpreting wrongly here--to the Ontario Labour Relations Board saying bad-faith bargaining has occurred, at which point the board will consider the facts. It can then take action against the person, if the board finds he has engaged in bad-faith bargaining. It cannot impose punitive damages, simply--what is the expression?

Mr. Failes: Compensatory.

Mr. Chairman: Compensatory damages against the party that engaged in bad-faith bargaining. The board cannot impose a contract under the Labour Relations Act.

Ms. E. J. Smith: On bad-faith bargaining, you would like clarification so that it shows up as bad-faith bargaining in this act. I should be very clear with you that, as our chairman says, we keep being asked to be more clear in the wording of it, but the ministry has made it very clear in its introduction that it was intended to mean something more than bad-faith bargaining. The clarification you are asking for would do the reverse of what you hope because it would clarify that it is something stricter than bad-faith bargaining.

Mr. McKichan: Then our opposition would be even stronger.

Ms. E. J. Smith: That is right. That is what I am saying. The clarification is a question but not the way you nope.

Also, just as a comment, when you say the world has taken another turn and people are unwilling to sacrifice freedom against economic gains--

Mr. McKichan: I said possible economic gains.

Ms. E. J. Smith: Possible. Okay. Maybe that makes a difference, but it is rather interesting because economics may be part of your freedom, so to

speak. The only reason government is involved at all in labour legislation is in this very close balance, and only history will reveal where people stand in their readiness in that balance.

Mr. McKichan: I would add that it would be a wrong assumption to make that the long-term or even the medium-term benefit of any group of employees may necessarily be served by a process of certification. That is a judgement that the employees--

Ms. E. J. Smith: This is a judgement that the employees must make.

Mr. McKichan: Yes.

10:40 a.m.

Mr. Chairman: There is hardly a day goes by when someone does not engage in some Marxist analysis of this bill.

Ms. E. J. Smith: That is right.

I note that Miss Reid is with Simpsons.

Miss Reid: That is right.

Ms. E. J. Smith: In many of these associations we see, it is my general impression that they represent the big guys in the business, whether they be pharmacists, doctors or retailers. Is that true of your association, that your executive is largely made up of companies such as Simpsons and Eaton's, or do you represent small employers in a meaningful way?

Mr. McKichan: Eighty per cent of our members are independents.

Ms. E. J. Smith: What about your executive?

Mr. McKichan: Approximately 30 per cent of our executive committee are independents. We have a convention within the organization that we will not speak on behalf of the organization unless there is a high degree of unanimity and no split between large and small members on any important matter at issue. Our independent members are vocal, informed, capable and fully participants.

Ms. E. J. Smith: This is an important issue to me, because in many cases we are dealing with a problem of a balance of power. Where you have Simpsons against the employees, I see the balance of power in one direction. There may be cases with a small retailer where the balance of power could be different. That is why I am interested in that aspect.

Mr. McKichan: I might add that most of our independent members do not have a great deal of practical experience on the subject.

Ms. E. J. Smith: I am aware of that.

Mr. McKichan: They rely for advice on the experts within the larger companies.

Ms. E. J. Smith: Not being in any way an expert and being truly a citizen representative, which is what a committee person is supposed to be, I

note that Mr. Mackenzie, who has some professional experience, makes the case that has been made in many movies, if I can say it casually. Once the organization is seen to be organized, then there is pressure from a big group--the employer--on the individual, which is an imbalance of power. Therefore, from Mr. Mackenzie's point of view, there is a need to create a balance before you go public with the fact you are going to talk. As I say, that is a position I can understand.

You talk about the lack of understanding by the ordinary employer of the whole process. Would you accept a recommendation to the ministry that everybody newly employed in any such organization be given, maybe when they apply, some very simple, easy-to-understand instructions about what is involved should a union process begin? Obviously, this would be in a nonunion organization. It might provide the means for them to be better instructed and, at the same time, leave the unions open to create some degree of balance before there is a confrontation.

Mr. McKichan: I think it would be helpful to have citizens informed.

Ms. E. J. Smith: I mean the people who come to work for you, not citizens.

Mr. McKichan: I assume they are citizens.

Ms. E. J. Smith: Something that is distributed to the citizens is not read by everybody. If it deals directly with your problem today, you might read it.

Mr. McKichan: I think information available to all employees in regard to the mechanics of the system is highly desirable.

Ms. E. J. Smith: So that would be something you would support as a recommendation that this be done?

Mr. McKichan: Absolutely.

Ms. E. J. Smith: Regarding the problem of the termination date as one to be used, could someone explain more precisely what the termination date would be in that case so I fully understand the arguments there?

Mr. Chairman: The chairman would also appreciate that. I will ask Mr. Failes.

Mr. Failes: When a union files an application to be certified, the board will set a terminal date by which time all parties have to file, for the union, evidence of union membership and, in the case of any employees who object to the union coming in, their petitions objecting to that. It is usually seven to 10 days after the application has been filed.

Ms. E. J. Smith: In effect, it is the suggestion of the application date being the terminal date. What Mr. Mackenzie is looking for is to protect the people from pressure.

Mr. Mackenzie: In a nutshell, it simply means the only role the company would have in that application, once the cards have been filed with the board, would be to verify who are members of the bargaining unit. The date they applied would be the terminal date. There is no opportunity then to organize the petitions against that application.

Ms. E. J. Smith: Okay. The last question I had was on the provisions on reinstatement. I tried to look through quickly to find them but I could not. Let us assume, as you say, that a long strike produces changes of circumstances. For instance, you said there might be a smaller volume and therefore fewer people called back. I would have thought the reinstatement provisions of the process would have allowed them to be called back on the kind of system the union agreement called for. I would not have understood it to mean you would have to call everybody back, even if you no longer had a work load.

Mr. McKichan: As my colleague points out, there may not be an agreement in relation to reinstatement in the collective agreement.

Ms. E. J. Smith: Are you talking about individual clauses in individual agreements?

Mr. McKichan: This is to take effect where there is no specific clause. It is clause 40a(11)(b).

Ms. E. J. Smith: Thank you.

Miss Reid: These particular clauses refer to the situation where there is a strike in effect and no contract has been put in place. What these refer to is the requirement to recall or reinstate employees after the strike is over on the basis of seniority, without giving consideration to the fact that, perhaps owing to pressures or business conditions that have transpired during the work stoppage, the company may not require all those employees back.

Ms. E. J. Smith: That is right, but would they not then simply have to obey the usual process? Whether you agree with it or not, the usual process in a union agreement is that there is a certain order that relates to seniority and so on. That is the general thing in the agreement. You are assuming there is no agreement. You implied they might not have enough volume to hire everybody back, but in effect, they would have to hire back only in the appropriate order, is that not right?

Mr. Mackenzie: They may also have hired a bunch of people to replace those strikers during the campaign, and they are the ones who will stay.

Ms. E. J. Smith: Generally speaking, what would be the normal process with an agreement? Would it not require that the union people who had gone on strike have precedence over people hired during the strike? Would that be the general pattern in an agreement?

Mr. McKichan: We are not arguing that point.

Mr. Pierce: You are not talking about existing contracts. You are talking about companies on new contracts; so there is no contract in force.

Ms. E. J. Smith: Yes. I am trying to find out whether something in here is unfair. I am not trying to bait the person.

Mr. McKichan: What we are saying is that you may not, for the particular functions you are performing--and they may have changed in the interim--

Ms. E. J. Smith: That is the next point; you made three. We are dealing with them separately: down-scaled, skills and abilities different and

smaller volume, which is somewhat the same as down-scaled. The skills and abilities I would deal with separately. I would think those would be described by a different job description. I am assuming that would cover that.

Mr. McKichan: If that covers it, that makes our point.

Ms. E. J. Smith: I have to assume any usual union agreement is going to cover job descriptions.

Mr. McKichan: The first contract may not.

10:50 a.m.

Miss Reid: With respect, it has to be understood that in this situation there is no collective agreement in effect. There may be no clauses agreed to with respect to recall rights, for instance. We are referring to whether, at the end of the work stoppage, the employer should be required to recall the striking employees in order of seniority. There are clauses within the current Labour Relations Act that give rights to striking employees in protecting their employment for six months. However, what we are saying here is the recall of those employees should be done in consideration of the business conditions of the employer, which may have changed during the work stoppage.

Mr. Taylor: Therefore, seniority would not necessarily be the only criterion.

Miss Reid: Exactly.

Ms. E. J. Smith: Yes, but let us face it, once you eliminate seniority, you eliminate everything.

Mr. Taylor: Why is that?

Ms. E. J. Smith: Rather than getting into a discussion about whether I agree or disagree with the present labour law, I am trying to figure out whether clause 40a(11)(b), which is what you are objecting to in these three points, is anything very different from what would happen in a second, third or fourth agreement. We are assuming with a first agreement you do not have precedent. Therefore, I assume clause 40a(11)(b) is trying to create as a protection the sort of clause that is generally in a third or fourth agreement and from then on, namely, that the people who have gone on strike have some protection.

Mr. Chairman: Could I ask Mr. Failes to jump in here with an explanation? I think the word "agreement" is throwing the committee.

Mr. Failes: In a third or fourth agreement, usually what happens is that at the end of a strike when they come to some arrangement for a collective agreement, the union sits down with management and they negotiate a return-to-work agreement. That is separate from the collective agreement and determines how the employees will go back to work.

What happens in this legislation is that the bill sets out a procedure for these employees to return to work, once an application has been filed. The primary procedure is that the parties will negotiate and determine how these people will return to work. That is the agreement referred to in clause

40a(11)(a). It is not a collective agreement, it is simply a return-to-work agreement, and that is done in recognition of the fact that the parties are in the best position to determine now these people should go back to work. In that case, they can take into consideration down-scaling or whatever.

If the parties are unable to agree, in the normal third or fourth contract situation, there is no intervention. That is simply up to the parties. Here we are imposing a collective agreement, so we go on to clause 40a(11)(b). Where there is no agreement, they would go back in order of seniority. However, the legislation does contemplate that there may be some dramatic changes in the operation and a situation where certain specialized employees are required for startup, and they may have very low seniority. In that case, the route for the company to follow is to apply to the board, if you read the last couple of lines in clause 40a(11)(b).

Ms. E. J. Smith: Yes, it says "...may be directed by an order of the board made for the purpose...."

Mr. Failes: That is the safety valve here to take care of that situation, which we hope will not be that common, where there is a startup problem or there has been some down-scaling and there is a necessity for lower-seniority employees to be called back first. At the same time, the board can supervise the recall of workers and ensure that, for instance, the employer is not doing this simply to keep on replacement employees, as opposed to calling back the union members. I think it contemplates all possible situations.

Mr. McKichan: I think the act does contemplate our concern. We simply felt it was not very explicit in making that point.

Ms. E. J. Smith: You feel that last line should be more explicit in its wording "...except as may be directed by an order of the board made for the purpose of allowing the employer to resume normal operations." You want to add, "and taking into account any changes."

Mr. McKichan: Any changed circumstances in that operation.

Ms. E. J. Smith: That is a possible thing that has been carried forward.

Mr. Chairman: Thank you, Ms. Smith.

Mr. Taylor: I have a question of our consultant. There is sort of a fear of the unknown in this process. You are talking about a first contract, and what is this first contract about? Presumably, we will not know what the conditions or terms are going to be until the board or an arbitrator imposes one. Is there any way of speculating in advance about what the prize is going to be when you have an arbitrator called in and what the uniform or acceptable clauses are going to be, or the general clauses that apparently are in place today? I am not expressing myself very clearly, but that is not unusual.

Mr. Chairman: I am glad asked the question.

Mr. Taylor: I will get back to you in a minute.

I cannot ask you what is going to be in the first contract because we are speculating as to what an arbitrator might impose. However, in these

situations, there is going to be the imposition of a first contract. Surely that first contract has to include some general clauses that you see in every contract. I do not know what those general clauses are. It would be nice to know what the prize package will be that will be standard, but may have some additions depending on the situation.

Mr. Chairman: Mr. Failes is on the edge of his seat waiting for this question.

Mr. Taylor: Perhaps he can indicate sample clauses and give us copies of a typical agreement that employees and an employer might expect to have if this were imposed from above.

Mr. McKichan: Perhaps I can interject. It is for this very concern that we suggested the legislation might stipulate that the extent of a first contract should be merely skeletal. It is wrong and an undue interference in the operation of the relationship between the two parties if a third-party arbitrator, without a great deal of background as to the circumstances of a situation, should attempt to construct a highly detailed and specific contract, getting into the bowels of the workings of a particular situation when the arbitrator obviously is not sufficiently educated to do it in that detail.

Mr. Taylor: Talking in a generic sense, the arbitrator might say, "In this particular industry, these are customary clauses that you find in union contracts." Here is a little guy with two, three or more employees. Yesterday Mr. Lloyd mentioned he had one contract with two employees. I do not know why they cannot negotiate their own deal with their boss; it is beyond me.

Interjection.

Mr. Taylor: If I am going to be a boss, I want to be boss of more than a two-man party.

Mr. South: You are married, are you not?

Mr. Taylor: That is right. That is what prompted my statement.

If you have reference to a particular trade, calling or business and in a generic sense you say, "These clauses are customary or typical of this business," you can expect that an evenhanded, objective arbitrator is going to accept all this, although he may know nothing about the business he is dealing with. He will impose those clauses whether they are relevant or harmful because they are typical clauses in that business.

When we get into second or 30th contracts or whatever where these things have evolved over a period of many years, they can be pretty onerous for a little businessman who is trying to eke out an existence. He is the last guy to be paid in business. He is taking all the chances and risks, but he is the last guy to be paid. If his family were not helping him, he probably would not be in business at all and there would not be any employees.

Now he has this formalized structure with these typical clauses telling him: "Never mind whether this fellow is productive. He has been there the longest and therefore he is going to stay." Because of your generosity, you have kept him off the street by keeping him on because he gets up early in the morning and opens the store. He has been a great old guy and you do not like to let him go. Then you are confronted with this kind of thing.

11 a.m.

I am speaking from an abysmal ignorance of union labour law. Are there standard clauses in terms of what these typical modern contracts are? I have a fear of the unknown as to what will be imposed. I suspect there may be a bonanza in organizational activities in terms of the little snops along the streets, service areas, little offices or whatever. People will sign the cards.

Mr. Chairman, you know what it is like when you sign up membership cards for your party. If a person does not pay his dollar, you pay the dollar. The membership cards go in and, eureka, we have everything in place.

Mr. Chairman: Mr. Taylor, in view of the enormity of the question, we should give Mr. Failes time to consider it. Perhaps he could deal with it when we deal with the bill clause by clause.

Mr. Gillies, you have been most patient. You are next on the list.

Mr. Gillies: I thought my colleague was auditioning for Labour critic; I was not sure.

I would like to ask Mr. McKichan a couple of questions, specifically about his comments and suggestions on subsections 40a(1) and 40a(2).

On subsection 40a(1), you indicated it would be your preference that there automatically be the appointment of a mediator or a conciliation board prior to access to the arbitration process. I want to solicit some further comments from you. I have some sympathy for that, but I think we are balancing two possibly conflicting aims here.

I agree with the philosophy of what you are saying, and it is ideal. The best outcome of a first-contract negotiation process is where the two parties negotiate it themselves, without the necessity of a third-party intervention. We have to weigh against that the need to deal with these matters in a reasonably expeditious way because of the very fragile relationship between a new bargaining unit and an employer. Can you comment on that? My fear is that introducing a lengthy conciliation process prior to this could draw the whole thing out into a very long and bitter dispute.

Mr. McKichan: We share your ambition for reasonable celerity. On the other hand, we are nervous that instead of this becoming an exceptional procedure, it will become a normal procedure in the sense that if it becomes to be seen as the most powerful and expeditious way of achieving a contract which is viewed as favourable, I fear the normal processes will be bypassed.

This new process could become automatic in one sense or a club in the other. Neither of these eventualities is desirable. I would be willing to sacrifice some time but not to the point of delaying the whole system. The expenditure of some time is a worthwhile price to pay to avoid the substitution of a process which is an alternative to the collective bargaining process.

Mr. Gillies: Do you see any merit in limiting the time that a conciliation board could take?

Mr. McKichan: Yes, there might well be merit in that.

Mr. Gillies: I worry about that a little. Every time you come up against an artificial time deadline, in my view, it opens the door to one or both of the parties saying, "We do not really have to work at this because in 10, 20 or 30 days, X will kick in and that will take care of all our problems." Another option would be to leave it to the discretion of the minister or the board.

We are really up against a classic problem with clause 40a(2)(b), and everyone on the committee is aware of it. The people who are strong proponents of this type of legislation, such as the labour movement and so on, are taking the position that the four preconditions, (a), (b), (c) and (d), are really tantamount to the necessity of finding bad-faith bargaining.

Most of the business groups that we had before us said that their preference would be that the prerequisite be a finding of bad-faith bargaining. I think the minister has tried to come up with something in between, and all of us sit here and say, "This is too vague." However, you appreciate that if the minister comes down very hard on one side or the other, it will polarize the situation somewhat.

You are representatives of the retailers. Because there was not a finding of bad-faith bargaining in the Eaton's case, one of the great suspicions in the labour movement is that the board is not inclined to give a very liberal interpretation of bad-faith bargaining. I do not want to put words in their mouths, but my impression is their feeling is if that is the law, they are not going to get anywhere with this legislation.

Mr. McKichan: It is very difficult to arrive at a finding of bad faith if the construction is applied to an economic circumstance. Obviously, there will be subjective views on both sides. If the catch-all clause (d) were eliminated, we would be reasonably satisfied with clauses (a), (b) and (c), which still, it seems to me, include words such as "reasonable". Courts have had a lot of experience in interpreting the word "reasonable." To include any other reason would open the door extremely wide.

Mr. Gillies: This came up yesterday. I am not a lawyer, but I am told that because of the structure of this particular clause, (d) is contingent on clauses (a), (b) and (c).

Mr. D. W. Smith: That is what we were told.

Mr. Gillies: Mr. Failes, can you speak to that again so that we can be clear on it?

Mr. Failes: It is the legal principle of ejusdem generis, the idea that you have to read a basket clause such as (d) in the light of other clauses such as (a), (b) and (c). It would have to be conduct similar to that found in clauses (a), (b) and (c), or at least tied back to the word "frustrated" in the case of this legislation.

Mr. Chairman: Since clauses (a), (b) and (c) are all apples, you could not get into oranges in clause (d).

Mr. Gillies: That is right. Clause (d) may be a catch-all, but it still has to refer back to clauses (a), (b) or (c). It cannot be just anything.

Mr. McKichan: The rule is well known. I acknowledge that fact. On the other hand, it does have an expanding effect or else it would not be there. It seems to me that it would be more precise without it, even though it is subject to the ejusdem generis rule.

Mr. Gillies: I want to flip ahead to your comments on subsection 12. Do you feel the bill goes too far in requiring the reinstatement of employees? You made some comments on that. Have you any suggestions as to what the floor may be? How far should the legislation go in protecting employees' rights at the completion of one of these disputes?

Mr. McKichan: It would be appropriate to rely on words such as "as may reasonably be practicable," words of that nature, keeping in mind that in all these cases it is difficult to perceive what has transpired in the interim. A little latitude is required, which should not be exercised solely at the discretion of the employer, but with the permission and guidance of the board to take account of changes in circumstances.

Mr. Gillies: If discretion were to be built into that section, you would want that discretion to be judged by the board.

Mr. McKichan: Yes.

11:10 a.m.

Mr. Pierce: Following some of the comments made by Mr. Taylor in respect to the unknown and the fear of the unknown and in respect to some form of a minimum contract or wording for a first contract, suppose the ministry were to put in place wording for first contracts that would be applicable throughout the industry and would be the norm for first-contract legislation, save and except monetary items, so that the monetary items would be the negotiable items and the items that would be adjudicated upon by the adjudicator.

Miss Reid: If I may respond to that, the Labour Relations Act provides for certain minimum clauses that have to go into all collective agreements. Where there is a disagreement between the parties, a dispute about certain issues that goes beyond those basic clauses, I would suggest the process of the two parties sitting down and negotiating what are acceptable terms and conditions of employment that meet that business situation.

I would be concerned that some standardized basic clauses for an industry might not be acceptable or suitable to the business requirements of all companies in that industry.

Mr. Pierce: I am not suggesting that only the ministry personnel structure the first contract. I am suggesting it would be in co-operation with industry, with your organization and with other organizations, in coming to some agreement about what the industry in general can live with for first-contract legislation. Knowing that you are going to get first-contract legislation anyway and that you are going to end up with a first contract, would it not be better to know that this is the wording you are going to be dealing with in the first contract? Once the decision of the adjudicator is made that this is part of the wording, then you negotiate off the other items.

We know that at present a number of the unions have what they call model agreements, and the model agreement is the Utopia of agreements. Everything

they think they are justifiably entitled to under proper negotiations is contained in the model agreement, and they work down from that in reaching a settlement because they already have that.

Mr. Taylor: That is what I was seeking, Mr. Chairman: Utopia.

Miss Reid: I would suggest that through the process of collective bargaining, the parties meeting and discussing, they have to come together to arrive at an agreement that suits everyone's needs. Without the need for any legislation to impose that, that settlement or agreement can still be arrived at. I do not feel it is necessary to have that legislation in order to arrive at a settlement that provides terms and conditions of employment that are acceptable to everyone, given the nature of the business and the uniqueness of that particular interest, whatever that is.

Mr. McKichan: It seems to me it might be more constructive if the act itself did not embody specific directions as to the specific clauses that were obliged to be included or not included but rather conveyed a direction that the first contract should be the minimum required for the reasonable operation of that facility or plant during the short period of time that the first contract took effect.

Mr. Pierce: However, you would feel more comfortable negotiating all of the contracts than having a first contract available that you know is going to be the minimum that the arbitrator is going to come down with.

Mr. McKichan: It seems to me it is very hard to design any document that is applicable to a universal situation. Even the most simple or basic of clauses may require some adaptation for some unique circumstances, and it would be readily accepted, or reasonably readily accepted, by both parties.

Miss Reid: We talked earlier about the preamble to the Labour Relations Act, the promotion of harmonious relations between employees and employers. We have talked about the freedom to join or not to join a union. We have talked about the education of the citizens with respect to what the collective bargaining process is. It seems to me that the whole cycle of going through certification, of participating in the negotiation process, is important for all parties. I think it is a healthy process to the extent that you can arrive at that settlement, and we have seen evidence of where those settlements have been arrived at through that process.

Mr. McKichan: If I may just add to Patricia's statement on that, it seems to me that a likely consequence of an imposed settlement on the Eaton's contract would have been an imposed settlement on the Simpsons negotiations. However, Simpsons was able to negotiate a collective agreement without that mechanism. I suggest to you, with respect, that had this legislation been in effect and had that contract been applied in the Eaton's case, almost as surely as day follows night there would not have been a negotiated settlement. It was almost a three-year settlement in the Simpsons case.

Also, it is disappointing to some extent that the draftsmen of this legislation did not make any attempt to discuss with Eaton's management what its views were in that situation and what its insights might have been in relation to the drafting of this legislation. It might still be useful to have that conversation.

Ms. E. J. Smith: That is what we are doing today.

Mr. McKichan: That is what you are doing today? I think it would have been better if it had been done--

Mr. Chairman: May we move on? I would like to take some of the others. We are running behind. Can you be very brief, Mr. Pierce?

Mr. Pierce: All right, just one further comment to that. My concern is not with Eaton's and Simpsons. My concern is with the Joes and Petes who have five, six and eight employees, who do not have the financial capabilities of sitting down and hiring a lawyer, as necessary, to negotiate their first contracts. If they had an idea of what the bottom line was, they could negotiate from there.

Ms. E. J. Smith: My questions are directed to the ministry representatives. When we get into the final discussion of this bill, there are two things on which I would like at least a brief word for my clarification, because I seem to have run into abuses.

One question is on reinstatement as it applies when employers go from full-time to part-time staff. In other words, if an organization had full-time staff and after a strike comes back and hires all part-time staff, do the full-time people who were laid off have the same rights of reinstatement or does that change the category? Do you understand? I can explain. For instance, Simpsons in London went from a lot of full-time staff to a great many part-time employees. That was an issue for the individuals at least, whether correctly or not.

The other question is one that I seem to have heard about in relation to banks. A bank closes down a branch because it does not have business and then shortly opens a branch. They move, and although it may be in the same neighbourhood, because it is a new branch there is no reinstatement. Those are two things I would like to look at when we are reviewing this.

Mr. Mackenzie: I think we are getting side-tracked on what should be in the contract. In union contracts, I suspect the key clause is not the maximum they can get. The vast majority of union agreements, about 80 per cent, would be the same or very similar. They set up the seniority and grievance procedures and certain basics. From there, they negotiate according to the company they are dealing with and the situation they are involved in. Sure, a model agreement could be set up. It is not necessarily the best they can hope for, as has been stated here. It is just a standard agreement. As I say, probably more than 80 per cent of the clauses would be absolutely identical. It is from there that the different situations we are involved in are dealt with.

Mr. Chairman: Miss Reid, Mr. Doucet, Mr. McKichan, thank you very much for appearing before the committee. We appreciate your input, because we know the retail sector is one of the contentious areas in labour negotiations.

Mr. McKichan: Thank you for your courtesy. We appreciated the opportunity to appear before you.

Mr. Chairman: The next gentleman to appear has a name and a face that is familiar to many of us who have been around here for a while: Mr. Geoffrey Hale from the Canadian Organization of Small Business.

Welcome to the committee. The committee welcomes your views.

11:20 a.m.

CANADIAN ORGANIZATION OF SMALL BUSINESS

Mr. Hale: The Canadian Organization of Small Business welcomes the opportunity to present its views and concerns on Bill 65 to your committee. Our organization represents about 6,000 small businesses across Canada. About 2,000 of them are in Ontario.

Most of our members are not unionized companies, but approximately 10 to 15 per cent are, and we have a concern inasmuch as the majority of companies currently subject to collective agreements have fewer than 100 employees and most of these companies are owner-managed businesses. Therefore, the small business community, whatever the overall composition of its membership, has a real and legitimate concern with regard to the appropriate drafting of this legislation.

The Canadian Organization of Small Business questions the need for the imposition of a first-contract arbitration law, together with the need for the discretionary powers given to the Ontario Labour Relations Board to impose a first contract under the law. However, we recognize that the fundamental principle of the legislation is not a question within this committee, so we will address our remarks very briefly to the potential impact of such legislation on small business. Then we will be pleased to receive questions.

The Ontario Labour Relations Act already gives the Ontario Labour Relations Board considerable latitude to intervene in labour disputes if it can be shown that either or both parties are negotiating in bad faith. As was noted in the discussion with the Retail Council of Canada, there has been some dispute about whether the existing legislation is adequate to settle cases where one side or the other may be totally intransigent and unreasonable in its approach to collective bargaining.

Unionization and the advent of collective bargaining implies a major change in the corporate culture of any small, owner-managed business. It will take time, in many cases, both for the employer to recognize that the rules of the game have changed and for the employees to recognize that there are practical limits to the speed with which change can be pressed in a small organization without a major disruption, both of working conditions and of the financial stability of the business.

Collective bargaining essentially involves a process of give and take, which both sides, being new to the process in many cases, need some time to learn. Until employers and employees arrive at a balanced and realistic agreement by which they can redesign the ground rules on which the business will operate, the collective bargaining system is a more effective tool for making expectations and results more realistic than an imposed settlement made by people who may have limited understanding and experience with the realities of smaller companies.

Bill 65 allows an expansion of the criteria of bad-faith bargaining that permits the OLRB to intervene in stalled contract negotiations. However, the way this legislation is worded is sufficiently vague as to provide considerable discretionary powers to the OLRB in interpreting what has effectively frustrated the collective bargaining process and whether intervention by the board is indeed necessary.

Our organization is deeply concerned that the vagueness and the discretionary powers contained in this legislation may be interpreted over a period of years substantially beyond the original intent of this Legislature, so that, in effect, more and more conditions for first-contract arbitration will be introduced by the board, building one case on another. As a result, rather than being a last resort, which it should be, in resolving deadlocks in first-contract negotiations, it will become an earlier and earlier resort, given the general discrepancy of economic and political power between large trade unions and small businesses. This is something which concerns our members greatly.

If this legislation proceeds, we recommend that it be clearly stated that bad-faith bargaining be the only criterion for the intervention of the board. We further recommend that the Legislature consider the creation of a series of checks and balances to ensure that the work done by union negotiators is subject to the control and approval of union members. We have seen in the Eaton's negotiations what happens when a union's professional negotiators may have considerable experience and the members less. It can result in a breakdown of democratic processes.

Many unions have a proud tradition of internal democracy which allows such checks and balances to occur. However, experiences in other countries show that these checks and balances provide not only for more democratic unions but also for ones which provide a higher level of service and responsiveness to their members. That is good for both employers and employees.

I welcome any questions you may have at this time.

Mr. Chairman: Thank you. Are there questions by members of the committee for Mr. Hale?

Mr. D. R. Cooke: The purpose of this legislation is to provide a redress for what seems to be a lack of checks and balances in the case of first contracts, which may correctly be there in the case of other situations. Do you not agree there is a problem there?

Mr. Hale: That depends on the degree of realism on the part of employers and those employees seeking a first contract. Given the existing approach of the Ontario Labour Relations Board, we are concerned that many small companies may be placed at a severe disadvantage in the interpretation of this law and the imposition of a first contract. The existing law effectively provides a period of six months for the resolution of a first contract, at which point what is in essence a guarantee of re-employment ceases, so there is an incentive for both parties to come to an agreement.

It is highly unlikely a small company could survive that length of time, given the effective pursuit of a strike; in other words, a strike which enjoyed the overwhelming support of the employees. This is perhaps the difference in the application of this law to the small-business majority, as opposed to the minority of large nonunion employers who are facing a first-contract negotiation. A law designed for application to that select minority of large corporations which do not already have unions will put those small businesses that are facing unionization behind the eight ball.

Mr. D. R. Cooke: You point out that most of the businesses you represent are not unionized. There has been some suggestion here this morning of the fear of small businesses being prone to more unionization as a result of this legislation. I take it you are not worried about that.

Mr. Hale: Frankly, the responsibility for maintaining a good working environment is in the hands of the employer. In most cases--not in all, but in most--an employer who treats his or her employees fairly and consistently and pays them competitive wages is not going to have union problems. The major openings for unionization generally come after a change of management, when there is a learning experience for both the managers and the employees and they do not go through the process well, we might say.

For most companies, if there is a union drive, effectively it is too late to do anything about it. In most cases, you have already brought that situation upon yourself.

11:30 a.m.

There are some circumstances where there will be a degree of arm twisting. Certain people show up at a job site, particularly in the construction sector, and are told they will not be able to work unless they sign union contracts. We have had a number of members come to us on that basis. They found themselves with a union, with employees who had signed cards, simply because they brushed up against a union construction site or something like that. That is the exception rather than the rule.

Mr. D. S. Cooke: I think the thrust of your answer is that you are not concerned that this change in the law is going to effect attempts to unionize small business in particular.

Mr. Hale: No. I think it will have a greater impact on the character of agreements that are reached as opposed to speeding up or increasing the number of union drives in small businesses.

First, once a union is in place, it is very difficult for a small business to do anything other than accept the entry of the union. Unlike large companies, small companies neither have the management resources nor the professional resources to take an effective union resistance campaign. Frankly, the law discourages such tactics. Small companies recognize that employees have the right to join a union. Properly advised small companies recognize that they interfere with that right at their peril.

Ms. E. J. Smith: In reading your remarks, a lot of what you are upset about is the existence of certain biases and so on within the Ontario Labour Relations Act. Do you have anything in particular that you would like to see in this act before the fact?

Mr. Hale: The first and most important thing is the removal of the discretionary powers. There are four tests established for the intervention of the Ontario Labour Relations Board. The catch-all clause, we believe, creates an unnecessary degree of discretion and uncertainty. The wording is vague and subject to expansion above and beyond the original intent of the legislation. If this goes in, we think it would be useful to specify that the board establish arbitration services specifically geared to the distinctive needs and realities of small businesses.

If this legislation is proceeding, it would be useful for the Legislature to recognize that the work environment in well-managed small companies is often very different from that in well-managed large companies. This involves recognition of the needs for flexibility and for recognition of individual merit. Many large companies are starting to recognize that you

simply cannot classify all employees as automatons in certain positions. That attitude from the dark ages is going out in most well-managed large companies. Well-managed small companies do not get into that attitude in the first place; if they do, they are inviting a union drive.

Those are two areas where we think changes could be made.

Mr. Gillies: Several small business people have put individual points to me. They may or may not be members of your organization, but I want to solicit your comment. One representation to me was that for a small businessman, who is unfamiliar with this process to retain counsel and prepare a case that would have any hope of success before the board, the 30-day period is possibly inadequate. Do you have any comment on that?

Mr. Hale: It is hard for me to say, never having had any direct experience with this kind of situation. Most members who are faced with this problem do not come to us until the problem is resolved one way or the other.

Mr. Gillies: All right. The other suggestion--which I think is unworkable, but I will try it on you anyway--made by an individual was that there should be some sort of small business exemption; that this legislation should not apply to companies with fewer than 20 or 50 employees or whatever it might be. If any two people have the right to organize, I do not see how this legislation can be treated any differently. Do you have any comments on that?

Mr. Hale: The Ontario Labour Relations Act might be tiered in terms of the standards that would be applied, but it would be very difficult to exempt somebody from all the rules that are designed to govern labour-management relations in a collective agreement, simply because this is the framework legislation for labour-management relations in a union-management setting. In the absence of framework legislation, where do you go?

Mr. Gillies: In other words, it is a much bigger issue than can be addressed in the question of first-contract law.

Mr. Hale: If there is to be recognition of the realities of small businesses, which are distinctive from those of large corporations, it should be dealt with by tiering rather than by exemption. For example, as I suggested earlier, one could set up arbitration arrangements whereby arbitrators would be chosen who are specially familiar with small business situations as opposed to bringing in experience from a totally different, large corporate culture.

What works for Stelco does not necessarily work for Joe's machine shop down the street in Hamilton. Both can evolve good labour-management relations in very different circumstances. Indeed, if you tried to impose the total bureaucratic mechanism that would allow labour and management to work things out at a very large and complex organization such as Stelco, it would simply be totally inappropriate to the small business environment.

However, you can come up with a different set of checks and balances which makes labour-management relations work for the benefit of both parties in a small business, unionized setting. To the extent that that approach could be taken and built upon, it would represent a significant and progressive advance in the handling of labour relations in small businesses.

Mr. Gillies: I have one last question. The Retail Council of Canada was before us this morning. While this bill gives the minister discretion as

to whether he would appoint a mediator or a conciliation board before the arbitration process kicks in, the retail council's brief indicated that it felt that should be automatic; that before you go to the arbitration process in any instance, the minister should take this intermediary step. Do you have any feelings on that?

Mr. Hale: The effectiveness of a conciliation board will depend on the willingness of both sides to meet with and respect the professionalism of the conciliation board. If it is made mandatory, I am concerned that it will simply be treated as an impediment of little or no concern, just as the existing collective agreements' intermediary stages in a grievance resolution are very often handled in just a pro forma fashion.

Where you have good labour-management relations, with a union representative and a management rep who are on top of things, that should not happen. However, that requires a certain degree of professionalism that you cannot expect from people going into their first situation in a highly emotional and very often adversarial situation. To the extent that either labour or management can make a decent case to the minister in appealing for a conciliation board, the process of appointing such a board should be as easy as possible, but to make it mandatory would probably reduce the overall effectiveness of such a board.

11:40 a.m.

Mr. Chairman: Mr. Hale, as an umbrella organization for small business, do you keep in touch with your membership and do you communicate with them directly on such matters as the rights of employees to form a union and the responsibilities of the employer in such situations?

Mr. Hale: We communicate with members through our newsletters and we offer services to members such as an owner-manager's employment manual, a publication prepared by one of our members, Berwick Ferguson Payroll Canada Ltd., which provides basic, accurate and up-to-date information on the legal rights and responsibilities of both employers and employees. It is up to members to take advantage of that sort of thing, but the basic information, and the fact that the information is out there and where it can be obtained, is provided to them on a wide variety of issues.

Mr. Chairman: You would communicate to your membership on something such as this legislation when it becomes law.

Mr. Hale: Exactly. We would say that there have been changes to the Ontario Labour Relations Act, that they allow A, B and C, and that the time to worry about making sure you are properly organized to deal with any potential problem is now as opposed to when you are into an adversarial situation. Avoid the adversarial situation and it will be better for all concerned.

Ms. E. J. Smith: Following on the same point, when the Retail Council of Canada was here, it suggested that employees often do not understand what they are doing when they sign cards. I asked them if they would be in favour of the government providing such information to employees so there was full understanding. Obviously the other interpretation that could be put on that would be that the government was encouraging people to unionize. You inform the owner, but how does the staff get informed so it has a full understanding of what signing a union card will mean?

Mr. Hale: That is a heck of a good question. As to the point you raise about the perception that the promotion of such information would encourage unionization, that would be virtually an automatic response by our members. It is up to management to make sure it is communicating effectively with its employees. If they do not communicate effectively with their employees, they create opportunities for that kind of misconception.

I am not sure we would want to see the government taking a more active role in education. However, the imposition of the requirement of mandatory postal ballots, for example, would allow the dissemination of that information when it became relevant to the individual employee, in a format that was fair and balanced and allowed the employee to make up his own mind with a minimum of pressure. That would be more likely to apply to medium-sized employers, say those with between 20 and 100 employees, where the signing of the majority necessary for automatic certification would be less likely to happen.

Mr. Chairman: What is bothering some members of the committee is that we are getting complaints from employer representatives that employees do not know what they are doing, if I can put it in a very stark way, when they sign a card to form a bargaining unit.

Mr. Hale: They do not recognize the full implications.

Mr. Chairman: They do not understand the full implications, and therefore, members are asking if it would then be appropriate and in the best interests of the employers to disseminate information to employees so they do understand fully what it means to join a union.

Mr. Hale: The availability of a mandatory certification vote provides the mechanism for the provision of that information in a fair, balanced and unbiased way. To the extent that once an organizing drive has started, the employer becomes involved in communicating some implications of unionization, the employer opens himself or herself to charges of interfering with the rights of employees to unionize. That is a catch 22, the availability of a mandatory vote, and this is where tiering could take effect.

My recollection is that currently 50 per cent of employees have to sign a card for automatic certification. If that percentage were skewed depending on the size of the business, and increasing the margin for error for the taking of a certification vote by postal ballot, that information could be provided.

The union could make its case and those opposed to the union--presumably outside management, given the current wording of the law--could make their case. The information provided by the Ministry of Labour could be fair and balanced. It would provide a certain cooling-off period during which the facts of the case, as opposed to name calling and posturing on either side, could be allowed.

I am trying to take as unemotional a view of the process as possible. I recognize that many of my members would have a difficult time in dealing with that. That is why we are trying to create a series of checks and balances that recognize the realities of the small business environment and allow the employees the maximum freedom to make an informed choice within the law.

Mr. Chairman: That is exactly what is bothering some members of the committee. This committee dealing with the bill cannot amend the Ontario Labour Relations Act as a whole. All we can do is address what is contained in the bill.

There are concerns that employees might not be as well informed as you would like them to be. To what extent does government have a responsibility to inform them about this legislation, when it is a new piece of legislation that they cannot be expected to know many details about?

Mr. Hale: If you are looking at it strictly in the context of this legislation, then the government informing employees about this legislation is of limited use if the problem of collective bargaining comes as a part of the certification process. If you wish to provide a guide to the give and take of collective bargaining to employees once a certification has taken place, whether by vote or automatically, that is another issue.

There are two separate issues. One is the precertification decision based on full information, which this legislation has absolutely nothing to do with. The other is helping newly unionized employees to understand the realities of collective bargaining once they have been certified and are working towards a first contract.

11:50 a.m.

Yes, the government could provide information of that kind to all employees who have signed union cards, after first going to an organizing drive, to put it in that context. Even so, if first-contract arbitration is a last resort, as I trust that most here would like it to be, then the information the government would provide would be how to avoid the need for first-contract arbitration and how to come to a workable agreement with your employer or, to the employers, with your employees.

If the government is providing information, it is just as important to give employers a reasonably balanced picture of the facts of life in negotiating a collective agreement as it is for government to provide newly unionized employees with the facts of life about some of the realities of life in negotiating a new collective agreement.

Mr. Chairman: Are there any other questions from members? If not, thank you, Mr. Hale, for appearing before the committee. We appreciate hearing from the small business community.

The next organization to appear before the committee is the Ontario Nurses' Association, and I understand its representatives have just arrived. Do the members have their brief? It is the white folder. What colour did you expect? We have with us, representing the Ontario Nurses' Association, Mrs. Nousiainen.

Mrs. Alexander: He is coming.

Mr. Chairman: She is not here yet?

Mrs. Alexander: It is Mr. Nousiainen.

Mr. Chairman: It is? I will get it straight.

Mrs. Alexander: Do you want me to go ahead?

Mr. Chairman: We are early. There is no problem if you want to wait.

Mrs. Alexander: He will be here in two or three minutes.

Mr. Chairman: Okay. Let us take a five-minute break, have a coffee and then we will start.

The committee recessed at 11:53 a.m.

11:58 a.m.

Mr. Chairman: We have with us the Ontario Nurses' Association. I believe Mr. Nousiainen is with us now. We are little early, but we appreciate the fact that you are here and we welcome your submission. Would you introduce the people who are with you?

ONTARIO NURSES' ASSOCIATION

Mrs. Alexander: My name is Donna Alexander, and I am president of the association. To my right is Mary Hodder, manager of labour relations.

The Ontario Nurses' Association is a certified bargaining agent for approximately 43,000 registered and graduate nurses in Ontario. As the voice of these nurses employed in hospitals, public health units, nursing homes, homes for the aged, the Victorian Order of Nurses for Canada, medical clinics and industry, ONA welcomes the opportunity to present its views about Bill 65 to this committee.

Recent events, such as the lengthy strike by Eaton's workers, indicate that the labour law in this province discourages meaningful bargaining in historically unorganized occupations. The association commends the government for its initiative in introducing this bill. We welcome this mechanism to put additional pressure on employers and unions to come to a freely negotiated agreement themselves.

While speaking in general support of this legislation, there are a number of problem areas where ONA recommends amendments. The association cannot support section 40a, which gives the Ontario Labour Relations Board the final authority to direct a settlement of a first collective agreement by arbitration.

I am sure there will be no disagreement that the board is already overworked and certainly does not need any additional responsibilities. But even more serious, this section opens the door for totally unnecessary lengthy delays in reaching an agreement. It creates another make-work project for legal counsel and burdens smaller unions with added expenses. There is something seriously wrong with the basic premise of our labour relations system when the process for reaching a settlement between two parties is so complex that union representatives cannot function without legal counsel at their side.

The association also has grave concerns about the criteria to be considered when the board evaluates a request for arbitration. The criteria are so subjective that, without overwhelming evidence, the board will simply conclude that the employer has engaged in nothing more than hard bargaining.

Consider this situation. The employer drags out negotiations with endless questions, procedural objections, repetition of his position and rescheduling of meetings. He delays the tabling of wages and benefit proposals and opposes union proposals on key issues, such as seniority. Finally, due to frustration and an unwillingness to agree to insulting offers, the union calls a strike. The board must be prepared to impose agreements where unfair labour

practices are subtle but devastating. If the union loses a strike vote and signs the agreement, decertification will usually follow. If the union strikes, the dispute will usually extend several months, strike support will erode and, after a lengthy struggle, the union will be beaten. A year and a half after its organizing drive, the union could be decertified.

Also, the association recommends that either the employer or the employee should have unfettered access to arbitration, which should be automatically available at the request of either party 90 days after certification of the bargaining agent. It is crucial the legislation ensures that neither of the parties, nor even the Minister of Labour (Mr. Wrye), has any avenue to stall the arbitration process. The 90-day limit should be exceeded only upon the agreement of both parties.

In closing, the association would like to point out that the real measure of this legislation's success will be its ability overtly to bring about a negotiated settlement between the parties without the necessity of a state-imposed first collective agreement.

Thank you for your attention. We welcome any questions.

Mr. Gillies: I want to ask one question about page 4 of your written brief. It is about reinstatement rights. In the brief, you call for the striking out of that part of subsection 40a(12) which makes provision for nonreinstatement "where, because of the permanent discontinuance of all or part of the business...the employer no longer has persons engaged in performing work of" this nature, etc. You want that stricken out.

How would you deal with those instances if it is not in the act? Would you leave such matters to the discretion of the board? If the company no longer exists, you cannot reinstate people to those jobs. If it is not in the act, would you just leave it with the board?

Mrs. Alexander: Yes.

Mr. Nousiainen: Basically, it says that.

Ms. E. J. Smith: The big question that always comes up with a shortening to 90 days is that you are creating a situation without enough tension to create any long-term, ongoing solution and are therefore in some ways postponing the real negotiating until the first strike after the first contract. In other words, in the first instance, employers and employees may need to be forced psychologically into a certain degree of bargaining to reach an agreement that will hold in the long term, rather than having something given to them that perhaps neither accepts.

Mr. Nousiainen: I am not sure it is a real concern to us at this point. We have also asked for a two-year first collective agreement, so I think they will have sufficient time to work on the relationship. I realize it is a difficulty in some ways, but how do you cut across this? We feel it is better to have this than to leave it open for a longer time.

Mr. Chairman: On page 2 of your brief, at the very bottom, you comment, "no attempt should be made to assess the bargaining behaviour of the parties." Is this because you are worried about clauses 40a(2)(a) to (d) being interpreted as a bad-faith bargaining test?

Mrs. Alexander: The interpretation of anyone's hard-nosed bargaining or unreasonableness is very subjective. If no attempt is made to address the behaviour on either party's part, it should be left open.

Mr. Chairman: That is the open access point, is it not? You are saying that if they cannot reach an agreement, period, regardless of behaviour on either side, there would be access to this legislation.

Mr. Nousiainen: That is right, and there should not be any presumption that one party or the other has engaged in bad-faith bargaining or things of that sort. We would be just as happy to have the arbitrator take a look at some objective criteria such as wage developments, economic criteria and cost of living, and assess the merits of each case on that basis without getting into, "We are going to punish you for your alleged bad-faith bargaining." For that matter, it could be the union in the sense that the union was not bargaining in good faith either. Be objective about it. Impose a first collective agreement using relatively objective criteria. That is what we would be happy with.

Mr. Chairman: Mrs. Alexander, if this were opened up more along the lines you suggest, what effect would it have on the Ontario Nurses' Association?

Mrs. Alexander: At this point, not much effect. The majority of our nurses who would be involved under this process are already organized. The hospital nurses and nurses in homes for the aged are already covered. The public health nurses are the only ones who might be involved in this. There is probably one health unit that is not organized and three or four of them may be organized with other unions. It may potentially have a bearing on community clinics, private physicians' clinics, nurses in industry, weight-loss clinics and such things, but the majority of other nurses in the province are already organized.

Mr. Chairman: Your interest in the legislation is more in terms of how it will affect the world out there rather than the ONA.

Mrs. Alexander: That is right.

Mr. Gillies: My first question is really supplementary to the one the chairman just asked. You are concerned with clause 40a(15)(a). Can I assume that your concern is really an extension of your concern with respect to subsection 40a(2), making the judgement? This is the one that says the arbitrator should consider whether the parties have made a reasonable effort to reach a collective agreement. Is it based on the same concern you expressed with subsection 40a(2), sort of subjectivity on the part of the board creeping in? Clauses 40a(15)(b) and 40a(15)(c) are very definite objective measures, working conditions, etc.

Mrs. Alexander: Yes.

Mr. Gillies: It is that subjectivity you are trying to get at.

You raised the matter of public health nurses. Roughly what percentage of public health nurses is within bargaining units at this point and what percentage is not organized?

Mrs. Alexander: I think they are all organized except for one and that is up north. A northern health unit is not organized but the rest of them are organized, not necessarily with us.

Mr. Gillies: I thought most of them were. There are very few people in the nursing part of the employment sector who would be covered by this.

Mrs. Alexander: If organized nurses increase in the private sector, it would have impact if they were organized with us.

Mr. Gillies: Possible future impact.

Mr. Mackenzie: Your arguments for totally open access are made by a variety of unions and that is probably the preferred route if we could have it, but there is also recognition that the government is not likely to move to totally open access. Do I take it your concern would be with clauses 40a(2)(a), (b), (c) and (d) and with whether the access is too restricted?

Mr. Nousiainen: Is that subsection 40a(2)?

Mr. Mackenzie: Yes, subsection 40a(2) with the preconditions. We have had from the United Steelworkers of America--and I understand more will be coming from the Ontario Federation of Labour--suggested amendments to these sections to make access easier. I have not heard the position of the ONA. What is the position of the ONA, or is your argument simply that you want automatic access and never mind anything else?

Mr. Nousiainen: We have not assessed in any detail the question you have posed, but we would be happy to go back and then let you have our comments on it. It is a little hard for us to become involved in that debate at this point. However, I think I follow your question.

Mr. Mackenzie: I ask the question from the point of view of reality in the situation we are in. We are not likely to end up with totally open access. Therefore, what is the next best situation we can get to make access to first-contract arbitration available?

Mr. Nousiainen: You remarked that the United Steelworkers has made a number of recommendations in this respect.

Mr. Mackenzie: It has made them and I understand the Ontario Federation of Labour has as well.

Ms. E. J. Smith: We should also keep in mind their expressed views on clause 40a(15)(a), because that was already marked with a question mark.

Mr. Gillies: Yes.

Mr. Chairman: I would like to thank Mrs. Alexander and her colleagues from the Ontario Nurses' Association for appearing before us. We appreciate that, even though it does not affect you directly very much, you have taken the time and effort to let us know your views.

Mrs. Alexander: Thank you very much.

Mr. Chairman: Members of the committee, we will come back at 2 p.m. We should note that our Hansard operator, Ken Ritchie, came in this morning in terrible physical condition and has continued to deteriorate through the morning, but he has rallied lately and we expect he will be back at 2 p.m. in good shape.

The committee recessed at 12:12 p.m.

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Publications

STANDING COMMITTEE ON RESOURCES DEVELOPMENT
LABOUR RELATIONS AMENDMENT ACT
TUESDAY, MARCH 25, 1986
Afternoon Sitting



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Staff:

Madisso, M., Research Officer, Legislative Research Service

Witnesses:

From the Security Educational Services Ltd.:

Patterson, B. J., President

From the Central Ontario Industrial Relations Institute:

Sargeant, T. W., Consultant

Potts, A., Research Director

From Fitzhenry and Whiteside Ltd.:

Fitzhenry, R. I., President

From the Ministry of Labour:

Failes, M., Policy Analyst, Labour Policy and Programs

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Tuesday, March 25, 1986

The committee resumed at 2:10 p.m. in committee room 2.

LABOUR RELATIONS AMENDMENT ACT
(continued)

Consideration of Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: The committee will come to order. I would like to see whether the committee would be interested in hearing from Paul Weiler on this bill. My own view is that we should hear from him because he has considerable expertise in the area. We will try to do some juggling and schedule him in for next week if there is no problem with members of the committee.

Mr. Taylor: We should have Eaton's in as well.

Mr. Chairman: Maybe Mr. Weiler will speak for Eaton's. Who knows?

Mr. Taylor: I do not think he can. It is an interesting exercise in dealing with the issues here. It might be very helpful to the committee. As a matter of fact, it was suggested this morning by the delegation.

Mr. Chairman: I do not think we are going to go out and recruit either employers or unions at this point to appear before the committee when we are so restricted in time. There has been ample opportunity for anyone to make an appearance before the committee.

Mr. D. R. Cooke: Does Eaton's know that Simpsons was here this morning?

Mr. Chairman: Simpsons were not here representing Simpsons; it just happened to have an employee here with the retail council.

That aside, let us proceed with this afternoon's groups. With us is Security Educational Services Ltd. Mr. Patterson is here. We are pleased you were able to come before the committee and we are interested in hearing what you have to say.

SECURITY EDUCATIONAL SERVICES LTD.

Mr. Patterson: I appreciate the opportunity to address the committee on the implications of Bill 65, particularly their impact on the security guard industry within Ontario. I speak not as a representative of any of the umbrella groups within the security industry but as a member of that service sector.

Clearly the intent of the legislation is to remove the strain on both the employer and the employee of a protracted initial-contract proceeding. Within the security industry we feel this bill will have a significant impact during the next five years in that the security industry is one of the largest growth industries, projected to require an additional 25,000 new employees Canada-wide by the year 1985. Approximately 25 per cent of those new positions will be generated within Ontario.

As a members of the contracted service sector, we believe this bill will have both positive and negative impacts upon our method of contracting. We would expect to see a great deal of activity during the next five years in an attempt to organize our industry.

We believe that as an industry we have a long way to go in improving the employee benefits within that sector. The concern among our members is not that we will eventually have to negotiate with a union but fundamentally what form that relationship will take.

Currently three unions represent fewer than seven per cent of the employees within the Metro Toronto area. There are currently 47 security firms in Metropolitan Toronto, with more than 70 firms in Ontario. We are clearly not one voice or one major employer, and the market conditions are different in the various regions of Ontario.

We want to make the committee aware that Bill 65 as it now stands would be very attractive to our employees and would make them an interesting target group for those unions wishing to organize this industry for us.

Our problem is the consideration that the current difficulties that impact on local employers within this area make it difficult at present for us to negotiate directly with the union. There are currently 700 contracted guards in Metro. The average wage is \$5.65. There are few or no standard benefit packages throughout our industry Ontario-wide. Training programs and working conditions vary considerably.

The five major firms in Metro are currently short 300 man-weeks at any given time. They are spending approximately \$75 per filled position in advertising in local media. Anyone who picks up the Toronto Star or the Toronto Sun will see a proliferation of ads for security companies. Currently, \$2,500 per week is being spent by the five major firms in this area to keep their employee strength up.

There is a significant short-term turnover rate in our industry. We find that once we have employees past the 60-day period, they are likely to stay with us, but we have had people hired and licensed and then they resign from a company within three days. It has a significant impact on our recruitment.

The solution for our industry would appear not to be Bill 65 but a much bolder step into the area of collective bargaining within the Ministry of Labour. We believe this will bring us in line with Quebec. We feel a fair wage clause within this bill would be far more appropriate for the service sector industries.

The current legislation will create what we believe to be a revolving door style of negotiation for some time to come, in that we will have negotiations and set contracts which may be enforced for only a year because a segment of a specific company in this city will have to negotiate from within a collective agreement, while other employers within the same market will not have that collective agreement as part of their negotiating package.

Under the fair wage clause we propose, a large, diversified group of employers and employees, along with a board of representatives from the Ministry of Labour, could establish the conditions of work and wages appropriate for the specific industry. We would then have a group of workers in this province whose base wage would not be based solely on the provincial minimum. All other areas could also be included in this style of negotiation.

A current point within our industry is that we are actively negotiating with Mr. Keyes to bring specific training standards and education into our industry by legislation. That will have a dramatic impact, for some firms greater than others, on the way in which we are able to market our services. If it were tabled while we were establishing that fair wage, we feel it would lessen the impact.

The security industry in Quebec currently uses this system to establish base rates and benefits. They are negotiated within the province annually. Currently, they not only have taken into consideration the working conditions to establish a base rate but also have established an additional pay incentive for those involved in supervision. They have established an additional pay rate for those who are involved with armed guards as well as sick benefits and additional benefit packages to cover the entire industry.

2:20 p.m.

The result is that the competition within the industry remains unchanged. We will still have a fair market system within the province. The wages and working conditions of employees in Quebec are currently 27 per cent above the Ontario average. This style of fair wage negotiation could have a similar impact on the rest of the contracted service sector within Ontario. The result in gradual upgrading of these occupations will benefit all members of society.

We have seen a number of long, protracted strikes in the province in recent years. Bearing in mind the specific case of Federated Building Maintenance cleaners at First Canadian Place, they currently appear to be worse off as a result of their collective agreement than they would have been under contracting. We see that to be a case in point for our industry.

We contract large numbers of guards to specific industries. Should the General Motors plant employ 60 guards, the guards might establish a bargaining unit at General Motors within a specific security firm. That firm would have a collective agreement only for those employees at General Motors. It would not impact on its entire operation and it would not likely impact on its competitors.

The Burns International Security Services Ltd. guards at Lester B. Pearson International Airport now are covered by a collective agreement, and as a case in point are paid well below the current provincial average.

Having worked within the security industry to bring training and education to the forefront, I am confident you would clearly find consensus in our industry for the fair wage option and support for this style of industry-provincial negotiation, with all parties benefiting and with far greater stability within the work place. That is a stand we would like to see the committee consider should this bill be rewritten, because we find we are not able to detract from the mandate of the bill.

We have difficulty envisioning now it is going to impact on us directly. How many specific firms are going to become targets for negotiation over the next year? How many firms are going to enter into collective agreements as a result of Bill 65? How long they are going to be in effect? How much impact are they going to have on our marketing ability in the province?

Mr. Chairman: Thank you, Mr. Patterson. That was an interesting presentation. Are there any questions from members of the committee?

Mr. Taylor: Can you explain the significance of educational services? When you were speaking I was trying to conjure up in my imagination the type of security work you did. Can you explain for my benefit and for that of other members of the committee the type of operation you are involved in?

Mr. Patterson: My firm concentrates specifically on training security guards and private investigators in this province. We have been in operation for three years and deal with all the major firms as well as firms with fewer than 150 employees. Of the 70 firms indicated in Ontario, the majority are what would have been classed a few years ago as mom-and-pop operations, small family businesses with about 50 to 100 employees.

Mr. Taylor: There are 70 different security firms?

Mr. Patterson: We look at the industry through the eyes of Pinkerton's, Barnes, Burns, Wackenhut, etc. What you do not realize is that the province currently licenses all these guards through the Ontario Provincial Police. From an educational point of view, we have addressed that problem by setting minimum standards in conjunction with the Ministry of the Solicitor General over the past three years to make sure our industry meets legal standards as well as the impact of new legislation.

Mr. Taylor: Do you have any competitors in the training of security guards or personnel?

Mr. Patterson: At present, there are the community colleges in Ontario. Twelve of them conduct law enforcement and security administration programs. I have one competitor in Cochrane, Alberta, and he has agreed not to come east of the Manitoba border.

Mr. Taylor: As far as the private sector is concerned, you have carved up Canada and this is your territory.

Mr. Patterson: I have what I perceive to be--

Mr. Chairman: I hope the federal investigators are not listening.

Mr. Patterson: Security training up until five years ago was predominantly nonexistent. We brought in two specialized programs while George Taylor was Solicitor General of Ontario to try to upgrade it. We have Bill 84 coming forward that regulates our industry, so we want to put specific safeguards in there.

Recent changes have dramatically impacted on our industry. It is a growth industry for a number of reasons. First, loss prevention and asset control that took place during the recession period created an awareness of those control systems. Now with the insurance controversy, a number of firms are looking specifically at bringing in far better security procedures.

It is the chicken and the egg from our point of view, as to whether security wages are low because companies are negotiating for low wages or because the minimum wage is a base for a number of companies to operate from or because there is not enough funding within the organizations. Until the province brought in its own in-house security force, it was an interesting group for companies to negotiate with.

Mr. Taylor: In response to someone from behind me, the government, the public sector, is obviously very involved in this area. Your competition

would then be the community colleges, the public sector, with its massive funding and all those aids. I say that for the benefit of Mr. Ramsay, who was commenting on the seeming combine you and your comrade exercised--

Mr. Ramsay: Comrade?

Mr. Taylor: --in the Canadian context. Seriously, going back to your area of concern, you seem to be addressing a problem not so much in terms of your own organization but in terms of your perception of the 70-odd firms that engage in the business of security protection.

Mr. Patterson: I represent the Association of Investigators and Guard Agencies of Ontario as its legislative representative. Because I am primarily responsible for bringing about the training programs to go with new legislation, such legislation has always been passed on to my firm to cover. I have also dealt with special police constables and tagging within Metropolitan Toronto in the past two months. So there are a number of impacts, such as the Provincial Offences Act, part II.

We want to be able to bring up the training standard. The only way that my firm and enlightened members of the industry in Ontario see that being done is that we must be able to establish something similar to what they have in Quebec within this province. We must establish a fair wage, so we can add training costs into that fair wage. We believe, for example, that if training were brought in by legislation, we could not establish a fair wage in Ontario. That would simply be taken away from the margin available for training.

Mr. Taylor: I understand your concept, but I am trying to relate that to the subject before us, which is first-contract legislation, the least significant part of which is wages. As I understand it from representations that have been made in the past by senior representatives, the big issue is not initially one of wages; it is one of terms of the initial contract, apart from wages. I was wondering if you have experience of any disputes over first contracts and how that relates to your industry.

2:30 p.m.

Mr. Patterson: I would not suggest to the committee that the security industry has the best record on first strike or some of the agreements. We have found the work generated during a strike period, for example, has a detrimental impact on our members. There is nothing more demoralizing than strike duty. I handled the strike within Seneca College and its outlying campuses and set up the security that was involved there. That was not first strike by any means, but long, protracted strikes tend to be a boom for business within our industry.

Mr. Taylor: I am speaking of strikes within your industry, not your role in being the benefactor of a strike.

Mr. Pierce: He plants the seed for a strike; that is all.

Mr. Patterson: There are some people hiring right now. For example, in the strike by employees of Burns International Security Services Ltd. at the airport, I was asked on behalf of the union to take a look at the training going on there. If you remember, that strike coincided with the Air-India tragedy. The question was raised as to the qualifications and training of guards. That strike resulted in a \$4.25-wage contract with no increase in

benefits, no specific hard-line improvements in the areas that went on the negotiating table. It just meant the company now recognized a collective agreement for those 87 employees at the airport.

Mr. Chairman: Mr. Mackenzie, keeping in mind that we are dealing with first-contract legislation, I urge you to avoid the whole question of restraint of trade.

Mr. Mackenzie: I was going to comment.

You realize that a fair wage agreement or clause, as you are talking about, would probably be considered an unfair subsidy and get struck down at any free trade talks.

Mr. Patterson: Mr. Mulroney has not asked me to take a look at the impact of free trade on the security industry, or the wage issue.

Mr. Mackenzie: Regional subsidies and fair wage agreements, which exist in a good many municipalities to the benefit of local industry or local employees, in the construction field in particular, would be very much in the class of an unfair subsidy. However, that is another issue altogether.

Mr. Patterson: It may be of interest that security officers in the United States make approximately 65 per cent more than security officers in Ontario.

Mr. Mackenzie: One of the first things that hits me is that \$5.65 per hour is your average. I know the benefits in the industry are very low. It is a pretty sad commentary, \$12,000 a year for somebody, especially if that person is trying to raise a family on that kind of income. How long has Burns had the contract at the Toronto airport?

Mr. Patterson: I am guessing that the contract has been in effect now for about eight and a half months.

Mr. Mackenzie: Who was there before?

Mr. Patterson: Burns was there prior to that. It has been a revolving contract.

As an aside, one of our industry's problems is negotiating contracts with both the federal and provincial governments where, in a number of instances, they have specifically taken the low bid. As a result, a low bid is based on a minimum wage plus the operating margin of that firm.

Mr. Mackenzie: I am fairly well aware of it. We have an employee in our caucus who lost her job because she was trying desperately to organize workers of Burns at the Toronto airport. This is going back two or three years.

Mr. Patterson: When I came into the business--assuming that in the next few years I would not own half of Canada--it was a case where there was a significant need for training and a specific training vehicle for a group of employees numbering 15,000 to 20,000 in this province. It has taken some time to get established. We are currently doing a quarter of a million dollars worth of business in this area.

Mr. Mackenzie: I guess everybody here has his own bias or axe to grind. I am not being unkind to you personally, but it strikes me the presentation you have made is a pretty self-serving one. If I give the industry the benefit, one of your problems, even in terms of wages, is that the competition in the business is so cut-throat right now with the number of people getting into it that you cannot pay a decent wage and get the contracts.

If you achieve a fair wage agreement, then rather than proceeding with legislation such as we have before us, all you are doing is taking the competition in terms of whatever is established as a fair wage out of your business. That is the total gain; it has nothing to do with this legislation. It is a straight opportunity to get probably a little better class of employee for you people, and you worry about the rest of the contract from that point on.

Mr. Patterson: Currently, it is interesting that we believe we are going to suffer under Bill 65 and would benefit under fair wage.

Mr. Mackenzie: That is exactly the point I am making.

Mr. Patterson: Those who benefit, apart from Quebec for example, are predominantly the employees. The competition and the operating margins for firms have remained the same. There has been an equalization. There was an initial decrease in the number of firms in the province because the low-bidding firms were not able to compete with the better quality operations. Once the fair wage was brought in, a number of firms opened and are doing quite well. It is not going to affect the competition in the marketplace. The great benefactor is the employee.

Mr. Mackenzie: Do you really believe that you want the government to have the total authority in terms of a fair wage or certain set conditions that leave you free to bid from that point on? I am finding today that not many people in private industry want the government to be the authority which sets wages and conditions.

Mr. Patterson: It is a perception in our industry that we are currently overregulated by the government to start with.

Mr. Mackenzie: Do you want more regulation?

Mr. Patterson: We want regulation that is to our advantage and over which we have some control as a party in that negotiation. We are currently regulated by the Ontario Provincial Police.

At present, there is an owner of a firm in Toronto who missed the March 1 filing date for his company application renewal. He received a letter yesterday stating he was out of business. He employs 247 security officers. It was certainly just an administrative blurb.

The OPP is our current regulator. To some extent, it is five members of the OPP who set regulations and standards that are then enforced within our industry. This is our only opportunity to come before the province and set those standards as an equal partner.

Mr. Mackenzie: You want them to set the wages and the working conditions of the employees, rather than the employees having a chance to do it themselves.

Mr. Patterson: I do not think you will get an organization to represent all employees in Ontario. As a result, you will have a number of small contracts with diversified unions. In the provinces that do not have fair wage--British Columbia and Quebec are the only provinces that have fair wage; a number of provinces have unionized guards, an association, etc.--it has not proven beneficial to the employee. We can continue to operate on 26 per cent and pay out wages of \$5.65. It is not a direct benefit to us; it is substantially a benefit to the employee.

Mr. Mackenzie: How long does it take to get a licence for a security guard today?

Mr. Patterson: If you live in Toronto, it takes fewer than six hours. The majority of that time is waiting for the application to be processed. If you live outside Metropolitan Toronto, it takes approximately two days because of mail delays and transfers.

Mr. Mackenzie: This does not say a hell of a lot for the regulation we have at present in terms of security guards, does it?

Mr. Patterson: I am absolutely in agreement. I would put Bill 84 on the table again tomorrow because it is easier to get a taxi licence than a security guard's licence. That may be one of the factors that keeps these wages in the conditions they are in.

Mr. Mackenzie: It may be one of the factors why we have so much trouble in some labour disputes as well.

Mr. Patterson: I have covered labour disputes in lecturing I have done. There are a number of cases to be made on both sides; whether the security companies are at fault or whether the agitation came from the other side. I suggest that six security officers on a picket line with 200 people are not likely to be the absolute and only agitators at that site, if that is the direction you were going.

Mr. South: My question has been clarified. You are talking about security guard firms, not security companies generally. Security companies install security systems in buildings. This is not what you are talking about when you say there are 70 of them in Ontario.

Mr. Patterson: No, contract security guard firms.

Mr. South: Conrad Black might be interested in the service of some of your firms. He claims \$30 million of his goods are carried off the premises.

Mr. Patterson: He owns one of the largest security companies.

Mr. Mackenzie: It takes a thief to know one.

2:40 p.m.

Mr. Chairman: Thank you, Mr. South. You extracted some valuable information.

Mr. D. R. Cooke: My question is entirely irrelevant and is based on Mr. Taylor's irrelevant questions. You mentioned the Young Offenders Act. How has it affected your business?

Mr. Patterson: It requires a degree of training on the part of security guards who patrol shopping malls. I think you realize that five years ago it was almost unheard of to have security guards in a mall in this province and now it is very much commonplace.

The Young Offenders Act has created a degree of expertise required to arrest and counsel a young offender and handle the arrest from that point on. That is why we as a group, primarily my firm, are pushing with the province to bring in training standards so that you do not have the library card licence-issuing problem. The Young Offenders Act is solely a problem, as it became a problem early, for the police. They took five-day seminars on the Young Offenders Act within Metropolitan Toronto. It just came in and was a part of the day-to-day operations. It is wrongful arrest, primarily.

Ms. E. J. Smith: Once again, I am seeking information because when you learn a little you realize now little you know. You say all the licences come through the Ontario Provincial Police. Would that be for a certain type of operation rather than, for instance, the ability of a company to hire its own? As you say, if General Motors did it, obviously it would have a fairly big unit. I am wondering how all-inclusive these licensed OPP ones are. If General Motors can hire its own, why cannot I, so to speak? How pervasive is the control? I am trying to get at what that means. As a second half of this question, how all-inclusive is the Quebec legislation?

Mr. Patterson: Currently, we have two tiers of security in Ontario. We have in-house operations where security guards are employees of the operation for which they work. A close example would be the Harbour Castle Hilton Hotel. It has 12 security officers on staff who are employees of the Hilton operation and are operated from within. They do not fall under provincial licensing. The second are the all-contracted security firms; anyone who puts himself out to be a security company and provides that service for a fee is licensed. Probably 75 per cent of the industry would be contracted, with 25 per cent being in-house. There has been a drop in in-house operations primarily because it is--

Mr. Mackenzie: Contracting out is one of the problems.

Mr. Patterson: Yes. Contracting out is one of the problems. Quebec has taken a broader definition of a security officer's function. It would include the security staffs at General Motors and the Hilton, so they would have to be licensed as well.

Mr. Taylor: What about off-duty policemen?

Mr. Patterson: Our industry has a real problem with off-duty policemen in Ontario because there is no difference between the powers given to a police officer off duty in a jewellery store on Yonge Street from the powers that would be given to a security officer who is armed and on that property by contract. The difference is that the employer can pay \$28.75 an hour directly to the Metropolitan Toronto Police or it can set up a contract with a security company and possibly pay \$7 or \$8 an hour.

We had the problem with embassies, for example, and the decision was to take it from Pinkerton's of Canada Ltd. When the decision was made to take those jobs and bring them back into the government sector, Pinkerton's ended up with the contract paying them \$5.85 and they were paying out approximately \$5 an hour to their guards in Ottawa. They went from paying approximately

\$12,000 a year to paying \$32,000 a year plus all the benefits that go with being a special constable of the Royal Canadian Mounted Police, with no appreciable change in the ability to stop the kind of incident that took place in Ottawa.

Ms. E. J. Smith: That is the other thing I was interested in. The licences all come through the OPP. Yet you were saying to me that when the OPP off-duty policeman does this--

Mr. Patterson: The OPP does not perform off-duty functions in the same way that Metro Toronto policemen do. Metro Toronto Police, for example, would provide security for a high school dance.

Interjection: A shopping centre is private property.

Mr. Patterson: It is now private property. That is all going by the wayside.

Ms. E. J. Smith: Therefore, if an Ontario Provincial Police person who is off duty is hired by Eaton's during a strike, which I gather happened in London, would that be directly through the police or through a licence provided to someone else by the police?

Mr. Patterson: The operation you are talking about does not exist in Metropolitan Toronto because the Metro police have specific guidelines. It must go through this pay-duty structure. With respect to the discussion in London on an off-duty police officer working for a contracted company, that does happen in this province. It is predominant in the Maritimes, for example. All the security staff for K Mart stores are off-duty local policemen.

Ms. E. J. Smith: Do they not have to get a licence?

Mr. Patterson: No.

Ms. E. J. Smith: Because they already have it.

Mr. Patterson: No. They are considered in-house and are not regulated.

Ms. E. J. Smith: This is off the subject but I think it is very interesting. Some time I would like to find time to pursue it.

Mr. Patterson: The question that came up was the shooting out west of the--his name escapes me now. He was involved in a number of murders in California and was arrested in a shoplifting incident.

Mr. Chairman: His name is Ng.

Mr. Patterson: Yes, Charles Ng. He was shot by an off-duty police officer serving as a security guard in that store. The question came up about what powers that police officer had.

Ms. E. J. Smith: Was he a policeman or a security officer?

Mr. Patterson: The big impact was whether they were going to pay for his convalescence; whether it was to be through the city or the company.

Ms. E. J. Smith: Yesterday we discussed somewhat that the construction industry is excluded because it has province-wide agreements rather than individual negotiating. You talk about the government having a role in arranging salaries. Rather than a fair wage agreement or the government doing it, it seems to me the other alternative that might be looked at would be your people all agreeing to deal with one union province-wide, which would be outside our jurisdiction to set up.

Mr. Mackenzie: Voluntary recognition. I can see it coming.

Mr. Patterson: I can see the 70 presidents getting together and agreeing. They cannot agree on roast beef for lunch when we meet once a month.

Ms. E. J. Smith: Short of that, you are asking the province to do it because they will not agree and therefore it would solve a problem, the competition between the individual firms which brings salaries down. That existed in construction too.

Mr. Patterson: I think we want to be treated as the construction industry is and have a specific set of circumstances under which we work province-wide. We want that recognized by the province.

Ms. E. J. Smith: Yes. That is why my comment is only that you are drawing a comparison that is rather similar to the case in construction; yet you are asking government to do the negotiating instead of doing it province-wide.

Mr. Patterson: The government would be one player in the game and it could be the arbitrator.

Ms. E. J. Smith: I understand what you are saying. I am just saying the role for government to be in there does not seem very valid to me, any more than to say government should be involved in construction because it is province-wide. That does not really resolve anything. I suggest it is like instant and permanent arbitration, which is quite a far-reaching thing. I am interested that Quebec seems to have that.

Mr. Patterson: In Quebec, they had the situation that, when they brought in fair wages, they had no body to represent the employees and it took three months for that body to be organized and become an active player in the three negotiations. It is not all major firms. All firms in Quebec have an impact on that legislation annually. Any of the organizations that represent the security industry are voluntary and can represent any number of interests.

Ms. E. J. Smith: London, for one, just opted out of the fair wages thing, I note from reading my newspaper.

Mr. Pierce: I am going to see if we can get back to first-contract legislation.

Mr. Chairman: What about Ng?

Mr. Pierce: I know it is a bore, but--

Mr. Chairman: You just dismissed Mr. Ng so lightly.

Mr. Pierce: Mr. Patterson, in your group organizations and the employees you have, is there a fair amount of activity on behalf of the employees to organize for the purpose of first contracts?

2:50 p.m.

Mr. Patterson: I suggest there is a feeling they would like to do that, but predominantly they work in groups of no more than two and they work shifts. It is fairly seldom that you end up with a significant number of individuals all working under one umbrella the way you did at the airport. Normally they would work in one business tower, and that might involve 12 employees of a company that has 1,200 employees.

Mr. Pierce: If Burns were not organized, would they have a hard time finding out who their fellow employees were at Burns?

Mr. Patterson: I think it would be difficult.

Mr. Pierce: Is that where the problem is?

Mr. Mackenzie: I can take you to at least one fired ex-employee who tried to organize.

Mr. Patterson: As an aside, the United Auto Workers Union of Canada now has a system in place so that should it want to organize the security industry, it could probably do it within three months.

Mr. Pierce: Do you have a separate fee structure and a different training program for security guards who are required to carry handguns as opposed to the ones who are not required to carry handguns?

Mr. Patterson: There are no fee structures.

Mr. Pierce: I mean a wage scale.

Mr. Patterson: No wage structures prevail.

Mr. Pierce: Is it whatever the market will bear? If you can get a guy with a gun for two bucks an hour, will you hire him?

Mr. Patterson: That would be contrary to the minimum wage agreements in Ontario.

Mr. Pierce: How about \$6 or \$5.75? You said the industry is paying \$5.75.

Mr. Patterson: That is the average wage. Armed guards in Metropolitan Toronto can earn as little as \$4.25 an hour and as much as \$9.75, depending what company they are at. There is no system in place.

Mr. Pierce: Is there anything to take into account the relative responsibility of the individual person and what he is actually guarding?

Mr. Patterson: Within the individual firms, but not--

Mr. Pierce: The individual firm does not pay the salary; you pay the salary or your organizational group does.

Mr. Patterson: If I am XYZ Security Firm, and I contract with the province to guard the Legislature, in the evening periods there would be 12 armed guards. As far as the province is concerned, they would negotiate that as a lowest possible tender. I do not think you would find an appreciable

difference in the service that would be provided. What you would find would be that the person who suffers is the guard. The guards working for the province are currently earning in the neighbourhood of \$8 and they are looking for a collective agreement to bring them to par with the Ontario Provincial Police.

Ms. E. J. Smith: As soon as you get government running it, that is what you get.

Mr. Pierce: They are doing what?

Ms. E. J. Smith: They are looking for policemen's salaries for security officers.

Mr. Taylor: I remember when the crossing guards were volunteers. They would work for a package of tobacco. They were retired. The first thing you know, they are organized.

Mr. Pierce: I have no further questions.

Mr. Chairman: Are there any other questions of Mr. Patterson? If not, thank you for your interesting brief and comments. The committee appreciates the fact that you have come before us.

Mr. Patterson: Thank you.

Mr. Chairman: The next group is the Central Ontario Industrial Relations Institute; Tim Sargeant. It looks as though you have copies of your brief. I think we have them as well. Will you introduce your comrade, as Mr. Taylor would say?

CENTRAL ONTARIO INDUSTRIAL RELATIONS INSTITUTE

Mr. Sargeant: I have with me Arthur Potts, who is our research director.

I do not intend to read this submission because I think the members can read it quite well. Perhaps I should tell you a little about ourselves as an introduction. We have seven consultants and a research director. We act for employers. We act in negotiations, arbitrations and Ontario Labour Relations Board matters for employers, in all matters relating to labour relations for employers.

Some 400 members use our services, some more than others obviously. In a large capacity, we act for small employers. We have some large employers, but on the whole we act for small employers, primarily with units of 200 employees or less. Our perspective on this brief comes from that point of view.

Yesterday, I listened to the Attorney General (Mr. Scott) on pay equity, who said that the government was concerned with new legislation being introduced in lots of areas and that there were Pavlovian responses to all these things. In one sense, coming before you--as I imagine a lot of employer groups will, and I do not plan to dwell on that--gives us that perspective.

In the first place, this committee should know that we think this legislation is totally unnecessary. Having said that, there are lots of reasons for that in our brief. Perhaps I can very briefly tell you why, because it comes from a perspective.

First, the preamble of the Labour Relations Act states, "Whereas it is in the public interest of the province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees."

We are really concerned that first-contract arbitration moves away from that view. You must realize that when one gets organized under the Labour Relations Act--and this is especially from the small employer's point of view--most times, there is now automatic certification at the Ontario Labour Relations Board. I am sure the board is aware of this. In other words, there is no vote, and we will not go through the issue of whether or not the union represents employees.

Having taken that from the perspective of a small employer who in many cases does not believe the employees really want a union--he starts from that perspective, and I will readily admit that to you. On the other hand, most employers whom we represent and have represented over the years do not wish the type of publicity we have heard with Radio Shack and so forth. When they get over that initial shock, they want to come to an agreement. Especially with small employers, it is a bit of believing that they have done the best for their employees and so forth. Most employers do not like to have that type of reputation, and they do bargain and come to a collective agreement.

Now you have a process whereby not only do they get certified automatically but they also find that there is a guarantee of a first collective agreement regardless. That is the way we see Bill 65 as being structured. I think you are going to find a lot of small employers very disgruntled with that. Not only have they been certified automatically but they also have a collective agreement put down automatically.

One must go back to the perspective of the Labour Relations Act. All the Labour Relations Act does in certification procedures is say to the union that if it has a right to represent these employees in its relations with the employer, with great respect, it does not necessarily give it a right to come to a collective agreement. A first agreement is important from both sides. It is important to establish a relationship. It is important to negotiate.

This bill, with great respect, will move away from that principle of negotiation because it will encourage both parties to stand pat on their positions in the hope that an arbitrator will come to the view that their view should be taken over the view of the other. It puts a third party in there with the ultimate responsibility of coming to an agreement.

What does that do for the second set of negotiations? You are going to find that rather than the normal case where the union comes and says, "We want improvements to the first collective agreement and we want improvements to come," the employer comes and says: "Look, these things were arbitrated against us. We do not want them. We do not believe them. We want them out." That is going to be a very dicey second set of negotiations for a lot of small employers.

I was interested to hear that you have Mr. Weiler coming before you. We have compulsory arbitration in lots of fields. We have had it under the Hospital Labour Disputes Arbitration Act for many years. It is a frustrating process. I have sat on boards as a nominee for employers. I have argued submissions. I have put submissions before you, which is basically what we will be doing in first-contract legislation.

It is a frustrating procedure because most of us, both on the employer and on the employee side, feel that no real bargaining has been done. It is the feeling that one gets from the board. You come before the issue and you say, "This is easy for the third party; let us let him do it."

3 p.m.

In a lot of senses, this is going on in the Hospital Labour Disputes Arbitration Act. You will see that Mr. Weiler made a comment on that in the Service Employees International Union decision where the union had come forward with a lot of issues, and he said: "We have to take all these issues in perspective. You are not going to get all of them, but why are they all here?" His view in the book he has written is basically that if you are going to have compulsory arbitration, it should be used only in those rare circumstances where there has been bargaining in bad faith.

The second point is, if there is going to be this legislation it is our view that it should be viewed only as a remedy and only in relation to those employers or unions that have bargained in bad faith, and a remedy should be set out there.

I say this again in two respects. The Ontario Labour Relations Board has very seriously set out terms and conditions in recent decisions about what an employer must do to bargain fairly--I will not bore you with all those as I am sure you have been there--and what information the employer must give. Perhaps it is not as simple as you may have been led to believe. An employer is under a duty. For instance, in the recent decision regarding the conservatory, the employer had taken the position that to get rid of the conservatory was no business of the union; the board held it was. They could negotiate about that, but there could be a hard bargaining stance.

I suggest there is a difference between having a legitimate hard bargaining stance based on whatever and bargaining in bad faith. This is a difference the labour board has recognized. As long as you are not bargaining with an anti-union animus, you are entitled to bargain in a tough and hard manner. This act, the way we read it, prohibits an employer from taking that legitimate hard stance because there seems to be some implication that the stance must be reasonable within some terms, or not, as clause 40a(2)(b) says, "uncompromising...without reasonable justification."

It seems to us there is an implication in this bill--and I will get to this more fully--that there is a difference, that in first collective bargaining, whatever has been recognized by this province, it is not legitimate perhaps to take a hard, legitimate bargaining stance as has been recognized by the labour relations board and that there is some other standard. We are concerned about that. We do not think the small employer should be any more prejudiced than large employers in that type of view or any other concerns.

We also think that bargaining is a relationship that should be established from the first agreement, and this bill is going to take away a lot of that. Frankly, you are going to have more situations going to arbitration than you ever would have believed--situations that should have and could have been settled without the threat of arbitration behind them.

For those reasons, we are of the view that this bill is unnecessary at this time, because there have been effective remedies and there are remedies that exist. Employers are very concerned. If you think the employers really

looked at the Radio Shack decision and what came out of that without learning some kind of lesson, let me assure you it was a very costly decision. You have heard some things about delays. The board is going through a process now where it is getting through hearings, but you have to commit yourself to weeks to get through them. I guess the delays that have been a part of the arguments for instituting this bill are not going to be allowed by the board any more, and perhaps that is a good process. For these reasons we do not think the bill should be passed.

Perhaps I could go briefly through the bill and our concerns if this bill is going to go forward, because I know that is what we are here for. We have submitted that we have concerns with subsection 40a(2) and the word "frustrated." "Frustrated" in contract law has a very definite meaning, and I am not sure that is the meaning intended in this act. I do not know what it means, in a sense. I say this because one negotiates. You negotiate and you come to impasses as you go along; that is natural. One wants to seek a way out of impasses.

What bothers me is that collective bargaining has been frustrated because of the four different clauses that follow: (a), (b), (c) and (d). There is a suggestion here, forgetting the basket clause for a moment, that if the board determines an impasse is not going to be there, there is really little incentive for the parties to find a way out. You are much better to stick with your position. This is what both sides are now finding under the Hospital Labour Disputes Arbitration Act. If you are going to go before an arbitrator, you might as well have your best position out there. Why seek a compromise? This is the first time that you are trying to seek a relationship between the parties that they are both going to like, and down comes a decision that nobody likes.

The board is going to find it very hard to resist any application if those impasses are there, especially given the basket clause. I want to talk about the basket clause in a minute. I do not know whether the basket clause is intended--and there is a good argument for this--to refer just to those things that are covered by (a), (b) and (c), or if it is "(d) any other reason the board considers relevant," which is wide and general. Heaven knows what that means.

In relation to that, I suppose one would have to turn to subsection 40a(15), which I will be commenting on later, where there is also a basket clause referring to "such other matters as the board or board of arbitration considers relevant to a fair and reasonable settlement." Given that, the word "frustrated" is difficult because I do not know what it means. I am sure we all get frustrated in some senses in bargaining. It is a natural give and take. There are positions on seniority and on overtime. There are positions on all types of things that one gets frustrated about in those terms.

Clauses 40a(2)(a) and 40a(2)(c) are most probably a repeat of the duty under subsection 40a(15), and I have no quarrel with those if I view this as a remedy that should be introduced only in the sense of failure or bargaining in bad faith. Clause 40a(2)(b) bothers me in the sense that I do not know what "the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification" means. I really do not.

There is another worrisome thing about this. If I am advising a client, I am saying, "Get your application in first, boy," because it is the uncompromising nature adopted by the respondent, i.e., the other side. He has to justify his position; I do not. I might have been as unreasonable as well.

I do not know if that is a consideration the board will take, but I might as well get my application in first because it seems to me the onus is on the respondent to justify his positions.

There is another concern in this. How much are you going to argue before the board about the reasonableness of your position? If I get my application in there, the respondent, almost before we go to arbitration, has to give away his position. I might as well just sit there and find out what his position will be. How far does he have to justify his position, and where do we go? It is a heck of a tactical advantage, and I do not think it is fair. If the board is going to look at it, it should look at the quality of the whole bargaining and not put the onus on who happens to be there first. As I say, I do not know what "any other reason the board considers relevant" means.

I have a concern in this sense. If a strike goes on for some considerable time and the union has opted to strike or the company has opted for a lockout, and it is not working, this is a heck of an interesting remedy to come back to. I would think the board would be very loath in those types of situations, with the pressure on it and the pressure we see from the paper, to refuse any direction to go to arbitration, which could be very fair to one side.

If I, as an employer, have decided to take on a strike for three months, with those costs and now all of a sudden I find I am going to be directed to arbitration, why have I taken those costs on in the first place? If it relates to bargaining in bad faith, if that is the test as intended, at least I can go to the board and say: "Look, you have not proved I bargained in bad faith. You chose your remedy this way. Let us stick with it." It should not be another tactic for either side to have to use if it is not working. They have chosen economic considerations, and that is what strikes are all about. Can I force you or can you force me?

3:10 p.m.

You have probably been dealing with a big employer here, concerned about the Eaton's case. Let us face it, this is probably known in management bars as the Eaton's bill. However, there are small employers out there who deal with the big unions of this world such as the United Auto Workers.

I believe we are taking a mallet to solve a couple of minor problems in that sense. People can comment on Eaton's however they want. The concern is that Eaton's was not found to be bargaining in bad faith. It is suggested that because they went to Manitoba where there is first-contract legislation and presumably did much better from the employees' point of view, we should have something such as that here. Frankly, I am not sure it is in the interest of either party to have that, but be that as it may, I will not get into that because I do not know enough about it. I gather there are problems even there.

I am really concerned that subsection 40a(2) gives definite advantages to the person who applies first. It does not recognize the realities of bargaining. It does not give the parties an opportunity to get down to real bargaining, as they should do, and find out what bargaining is all about.

Mr. Potts: If I can add to that, in subsection 40a(2), the process of collective bargaining involves a whole series of subtle presentations of positions, this side and that side, and not always necessarily giving your whole side for obvious reasons. You are often trying to seek an area of compromise by very subtle and passive messages. If the employer or the

bargaining agent was forced to come in front of the board to justify his position, to demonstrate his reasonableness, in a sense it is like undressing in public. He is stuck. His position and his bargaining leverage is open. His position is no longer hidden in the sense of trying to find out where that compromise will ultimately go. It would be very disruptive to the process of collective bargaining.

Mr. Sargeant: I will make one other comment about this. Many times in collective bargaining you do take unreasonable positions, but you pay for them. The union wants a clause that is unreasonable. I want a clause that is unreasonable because that is the way I want to run my business, but I will pay for it. I will give an extra nickel on the wages or I will do something else. I will compromise on this thing.

You are going to destroy that type of legitimate bargaining. You do not necessarily have to take a reasonable position in bargaining all the time. It might be a business decision in the sense of whether one is arguing that this is reasonable or not. Sometimes you take a very strong position because you want that for various reasons, but you pay for it on the other end. Unions will sometimes say, "An extra nickel will buy that," and it is worth the nickel to you. However, you then might have an arbitrator say, "The heck with that," and this has happened under the Hospital Labour Disputes Arbitration Act, where you paid for it and then the second one went to arbitration and it was knocked out.

The other question one has to ask under this is, what does the board look at? Is it a subjective test whether it is reasonable? Is it an objective test? Is it reasonable for me, because the union has made an unreasonable premise, to answer with an unreasonable premise? Is that reasonable? Will the board consider it reasonable? What is uncompromising about that? I do not know.

Passing through this very quickly, there is one item I would like to point to that is not in our brief. It is a very small point. It is subsection 40a(7) which states, "A board of arbitration appointed under this section shall determine its own procedure but shall give full opportunity to the parties to present their evidence and make their submissions and section 108 applies to the board of arbitration, its decision and proceedings as if it were the board."

Section 108 of the act defends against taking these things to the court stating, "...shall be questioned or reviewed in any court." In my view, this has gone further than the Hospital Labour Disputes Arbitration Act which protects only the procedure, as I read that act. It does not protect the decision. I do not think a decision should be protected from a review in the courts. Many decisions are now going forward under the Hospital Labour Disputes Arbitration Act challenging the decisions on all types of bases. That is not to say these clauses always work in the courts, because the courts say they are wrong, but it interests me that the word "decision" is in there. That is just a minor point on the way through.

I do not think an arbitrator, unlike the board, should be insulated from his decision. We are dealing with first contracts where both parties have very important items. It is very important to an employer in a first contract, especially the small guy, and you are trying to tell him that the decision of the arbitrator should not be reviewed by somebody else.

Another comment we would like to make concerns subsection 40a(11). One could argue this backwards and forwards. First, if there is a long strike

before an application--this issue is before the Ontario Labour Relations Board now but there has been no decision on it--why should you automatically have to reinstate employees if you have legitimately hired others? There is a question about that. It is probably a recognized view of labour relations that how to get them back is sometimes a bargaining point between unions. However, that is a minor point and I suppose it is getting a little esoteric.

Let me talk to you about my concerns with this section. It says, "...the employer shall forthwith terminate the lockout and the employer shall forthwith reinstate the employees in the bargaining unit in the employment they had at the time the strike or lockout commenced." First, it may be that I do not have these jobs any more. It may be I have lost customers during the strike. Subsection 40a(12) does not deal with that. It deals with a situation where you have said there has been a permanent or partial discontinuance. I am not saying there has been a partial discontinuance. I am saying we just lost some business.

It seems you can agree under clause 40a(11)(a), but clause 40a(11)(b) seems to be different. It seems to suggest that you bring them back by seniority. I do not know if this clause is meant to suggest that you bring them back into any position you have open.

I suppose I should go back a little bit if you are not familiar with labour relations. Clause 40a(11)(a) suggests that you reinstate them to the job they had, their classification. Clause 40a(11)(b) suggests you return them perhaps to some other classification. There seems to be an internal conflict between the preamble of subsection 40a(11) and clause 40a(11)(b).

Clause 40a(11)(b) does not say they even have to be qualified for the job you bring them back to, which I find astounding. Surely that should be there. It says, "...except as may be directed by an order of the board made for the purpose of allowing the employer to resume normal operations." I presume you would get an order of the board that this person was not qualified to do the job or whatever, but it seems a long step. When does the employer make that application? Does he have to make that application at the same time as the direction is being made? When does he argue who should be reinstated and when and how? I think there are some foggy systems in here. If we are going to have this, there should be something saying, "People will be reinstated by seniority provided they are qualified and capable of doing the job, and dependent on needs." I do not know why we have to go through all this business about applying to the board. If it is wrong, if there is any union animus and so forth, I can assure you there are remedies under the board which are being used effectively now on recalls and so forth.

We have a concern about the way subsection 40a(11) is structured. We say subsection 40a(12) does not answer that concern.

I do not intend to deal with all the sections, just the ones with which we have major problems.

Subsection 40a(15) obviously sets out the criteria for an arbitrator. I suppose one could argue about this for ever. Criteria are very important as to what you set out and I think a lot more thinking has to go into what you really think about. We get into these kinds of arguments about criteria all the time under the Hospital Labour Disputes Arbitration Act. I am sure you will have millions of kinds of criteria on what is total compensation and so on.

For instance, in the Hospital Labour Disputes Arbitration Act, many arbitrators have held that the ability to pay is not a relevant consideration because it is government financed and done on that basis. As you will recall, that had to be put specifically into the last act for that brief period.

Let me deal with them as they are. I think the committee has already dealt with clause 40a(15)(a). It should not be there. It is suggesting there should be a punitive award, and if an arbitrator is going to be there, he should not be looking at the quality of the bargaining in any event. That should not affect what his award is going to be. It is suggesting that some kind of punitive action be taken. That comes under other remedies, but it should not be for an independent arbitrator to consider.

3:20 p.m.

Clause 40a(15)(b) says, "The terms and conditions of employment, if any, negotiated through collective bargaining for employees performing the same or similar functions in the same or similar circumstances as the employees in the bargaining unit." First, this says that comparisons can be made only with organized bargaining units. My competition, especially the small employer, will most likely be in the unorganized field. Why can I not be compared with where my competition is? This leads me to the basket clause.

If you say that the basket clause is arguable, clause 40a(15)(b) could be argued under the basket clause. However, if you take the restrictive view of the basket clause, it could not, because in a sense it says that the terms and conditions that can be compared are only those terms and conditions of organized employers, i.e., negotiated through collective bargaining. Surely that is wrong. Surely I as an employer am able to consider unorganized as well as organized.

Mr. Potts: I can clarify this a little. The idea is, if it is truly a bad-faith bargaining test only, the basket clause we spoke of initially, clause 40a(2)(d), is read only in conjunction with clauses (a), (b) and (c). That is the restrictive sense. If you apply that restrictive sense to subsection 40a(15), the arbitrator's hands are completely tied as to what kinds of factors he would consider relevant to a board of arbitration. If you read these clauses consistently, you get a ludicrous result.

Mr. Sargeant: There is another problem with comparing only with what is negotiated. First, negotiation is a process. You do not get everything you want in your first collective agreement; it is a building process. It is going to be totally unfair for the first employer to be compared with somebody who has had an agreement in place for 10 or 15 years, for instance. There may be many things in those types of agreements that it would be totally unfair to compare yourself with. It is unfair to compare the first collective agreement with a fairly sophisticated ongoing relationship.

Second, there is no limit. "...Performing the same or similar functions or in the same or similar circumstances as employees in the bargaining unit." I do not know if a geographic limit is intended or not. It may be that it is not fair to compare employees in Chatnam with employees in Toronto, but it does not seem to be these kinds of restrictions. We suggest that if we are going to have these, these are the kinds of suggestions that should be there.

I think clause 40a(15)(b) puts forward unfair types of criteria from an employer's point of view. The key criterion, the ability to pay, is not there at all. Surely from the private employer's point of view, one chief concern

is, what the neck can he pay? That is not even in there, which is really unbelievable.

Mr. Taylor: For some maybe.

Mr. Chairman: Mr. Taylor, stop heckling the witness.

Mr. Taylor: I am not heckling the witness; I am heckling the government.

Mr. Sargeant: In fairness to everybody, it may be that with the large employer the ability to pay is not one criterion he looks at. He looks at the competition and so forth. For the small employer though, it sure as heck is one of the key criteria he looks at.

Mr. D. R. Cooke: And what the employees earn--

Mr. Sargeant: Yes.

Mr. D. R. Cooke: --or want to.

Mr. Sargeant: Finally, I have one comment, which I am sure you are going to hear from a lot of us, from the employer's point of view. In subsection 40a(16), you have said that the agreement should be for two years. If you are going to impose an agreement, that is far too long; the maximum should be one year from the date of certification. I do not intend to pursue this; it is in the brief. However, if we are going to start to establish relationships and we get something imposed on us for two years, you are going to have an employer sitting there festering. An employee is not going to be happy all the time either.

What I find fascinating about this whole thing is that if you listen to unions, under the Hospital Labour Disputes Arbitration Act they want the right to strike. It all depends on where the bargaining strength comes from. If you think you have bargaining strength, you want to strike; if you think you do not, you want compulsory arbitration. For instance, you see the nurses in the public health units who do not have great bargaining strength crying to get compulsory arbitration because they cannot command the rates that the nurses command under the Hospital Labour Disputes Arbitration Act.

Without getting into an argument about whether I think the arbitration system has done a good job for us, or whether it has been realistic--there can certainly be many arguments about that--many of us as employers would love to see some of these industries let free where there is compulsory arbitration. However, that is a whole other issue and does not relate to first-contract legislation.

What does relate to first-contract legislation is we are having trouble finding really qualified people who are going to take on this kind of stuff. If we get into the why's, I think you are going to find numbers of them. Perhaps this is a side concern, but it is a growing concern out there now. Under the Hospital Labour Disputes Arbitration Act, one of the real restrictions on this--and it is not in the bill fortunately; he can charge what he wants--is the fees paid to arbitrators. Be that as it may, it takes a pretty knowledgeable person to deal with these kinds of things.

For the small employer, briefs are difficult. The Ontario Nurses' Association, the United Steelworkers and the UAW have research departments.

They come in with a brief this high, full of research and so forth. It is very hard for the small employer to get a brief even this high without large expense. It takes a while. I have done it. He does not have the same kinds of pooling arrangements.

Interest arbitrations are frustrating from the points of view of both sides. In our view, this act seems to be leading down that path. I think you are going to get into it more. It is going to discourage what has been, and I think still is, a recognized principle of free collective bargaining in this province. Real consideration should be given to whether the bill should proceed on this basis. If it does, we say it should be viewed only as a remedy and that for bargaining faith.

Mr. Potts: I have a final argument for the numbers man in this organization. The minister seems to be keying in on the 15 per cent of new certification which does not achieve a first collective agreement. There is a perception that there is a problem when 15 per cent of new certifications do not result in first collective agreements. I have not seen sufficient resources directed to why 15 per cent in itself is a problem.

There are numerous factors, other than illegal or improper employer activities, which could account for these first certifications not resulting in first agreements. Notably, some are bankruptcies. There are decertifications where employees may have had a change of heart. Also, in situations where the union recognized it just did not have the economic clout to continue--this is an economic struggle in a sense; collective bargaining is designed as such--it walked away from negotiations, admittedly maybe after years of struggle, but that was the reality with which it was faced.

It is this 15 per cent which I suggest that members of the committee try to analyse more closely. What is wrong with an 85 per cent success rate of first collective negotiations? It does not strike me as being horrendous. If any of our children consistently ended up with 85 per cent, we would be delighted.

Mr. Chairman: The statistics the Ministry of Labour has provided show it is closer to a 90 per cent success rate.

Mr. Taylor: It is 89 per cent.

Mr. Potts: That is in the 1982-83 year.

Mr. Chairman: And the 1983-84 year.

Mr. Potts: I am going back to 1971 to 1983, where there is a range of about 32 to 89 per cent. You are right; more recently it is 88 per cent.

Mr. Chairman: To answer your question, those unsuccessful ones have been high profile and have been raised in the Legislature.

Mr. Potts: A couple of them have. This is the point. A couple have been high profile; five, six, maybe 10 in the last three or four years when we are talking of 30 to 40 a year of unsuccessful first collective agreements. Those ones that are not high profile are really the substance of that 10 or 15 per cent for which, for whatever reasons, the union did not have the staying power. I do not mean in any sense that the employer drove them out, but the interest and the commitment were not there.

Mr. Mackenzie: Is that like saying we are getting more--

3:30 p.m.

Mr. Potts: I think it goes the other way, actually, Mr. Mackenzie. In the course of the certification, the way our act is set up, we are encouraging collective bargaining. In many instances with a card majority system it may well happen that in the initial organization drive the continuing support is not there. The reality of the collective bargaining relationship is established through the collective bargaining, and in that critical test the support was not there.

Mr. Chairman: A number of members have indicated an interest in asking questions of you.

Mr. Gillies: Mr. Sargeant, you have raised so many interesting points that I hope we have some time for questions because there are a number I would like to ask you.

One of the last things you said merits a concern that has been brought to me about the time limits. You mentioned that for a small employer unfamiliar with this area of law to retain counsel, prepare a case and have any hope of success within 30 days is probably unrealistic. If the bill is to be proceeded with, do you have any thoughts about what that time limit should be? I have been toying with moving an amendment to change it to 45 days. We do not want to lengthen this process unduly, but it has to be fair.

Mr. Sargeant: I think that would be fair. What can I comment? It would take a long time, especially with a new employer. More probably more from a new employer's point of view, I think 45 days--you are right, one does not want to delay these things.

Interestingly enough--and I am sure the members can comment on this--in the experience we have had with compulsory arbitration, regardless of all this and regardless of how quickly you get your briefs done, they still take a long time. In that sense if we have to have it, I do commend the bill's at least trying to move it along, because I do think it is fair to both employees and employers at least to try to get this process, if you are going to have it, but I do think you need a little more preparation time. That is fair.

Mr. Gillies: I tend to agree with you. I have a concern about the time lengths, because you get beyond the 30 days, 45 days or whatever it is and get it into the board. I can tell you on the basis of what I am hearing there is a great deal of snickering going on around the ministry and the Ontario Labour Relations Board. The overwhelming feeling is that there is going to be a ministerial variance in every case, that the time prescription in this bill will never be met because of the logjam at the labour relations board.

Mr. Sargeant: The logjam there or the logjam of finding an arbitrator that you are both happy with? If I want a Mr. Teplitsky or someone, I am waiting four or five months now to have him regardless. Even if you get your brief prepared, you are not going to find him.

If you do not agree, of course, and you want to go to the board, I would be very surprised if many board chairmen would want to take this on, to be honest with you; but that is their concern and not ours.

Mr. Potts: Actually, I might clarify that the time limit for going to the board is 21 days under subsection 10: "The first hearing with a board of arbitration appointed under this section shall not be later than 21 days after the"--on, sorry--"the appointment of a chairman."

Mr. Gillies: No. I am talking about the period of time before the board examines it. The period of time that the parties have to prepare their cases is the concern. At one point I wondered whether we should be amending the time that the board has to deal with it, but I do not want to do that. I do not think we want to take the pressure off the board to clear up whatever logjam it has and get on with it.

I was interested that in your oral presentation you said that the word "frustrated" indicated certain definite things to you within the context of contract law and collective bargaining. In your written presentation you say, and I am quoting from your brief: "Given the wording of section 40a...it is our concern that the board may well order a direction to arbitrate in situations where the parties have come, for a moment, to an impasse and in the board's view the bargaining has become 'frustrated.'" Is that what you were referring to in the presentation today? Is that what you think "frustrated" is going to become under this act?

Mr. Sargeant: Put yourself in the board's position and put yourself into the bargaining position. You are dealing there with the frustrated part. You are dealing there with the thing that says the board--that is basically it. If I am in a position on seniority or if I am in a position here, why would I seek to compromise on that position if I feel that I am not--I do not know how to put this.

If I know there is compulsory arbitration behind my thoughts, I am not nearly as willing to mediate and to find a compromise as I am if I know there is a strike or a lockout behind it. There is far more pressure on me, on the employees and on everybody to bargain and to find agreements and a way out of impasses. I have negotiated under both, and where there is compulsory arbitration, I will take the private sector every time, if either the union has the hammer or if I have the hammer. There are situations where I have the hammer and situations where the union has the hammer. We have got to live with it. At least I know where I am coming from. We all take positions and we do not back off of them. We say, "let us find a third party to find the solution for that."

This is my concern. The word "frustrated" suggests to the party, "If you come to an impasse, why try to find a way out?" What is the board going to do with it? They come to you and say: "There are six issues. Here is their position. Here is our position. We just cannot find a way around it." That is what bothered me about the word.

Mr. Gillies: I heard that before Mr. Wrye ever introduced this bill, there was quite a debate within the ministry and some people were actually pushing for a final-offer selection process. What do you think that does? Is it workable in this context?

Mr. Sargeant: It all depends on what you mean by final-offer selection. It has been done a couple of times in school boards and things. Do you mean a final-offer selection on each item or do you mean a final-offer selection on the total proposal?

Mr. Gillies: I do not know what they were talking about.

Mr. Taylor: The total package.

Mr. Gillies: I am intrigued by their picking one of the packages. When we talk about the situation, the position is--

Mr. Sargeant: There is a problem with final-offer selection. Let us go back four or five years to when we had the big push in the nurses' arbitration. If there had been final-offer selection there, you would have had an arbitrator sitting with 50 per cent on one hand and five per cent on the other hand.

The difficulty with final-offer selection on a total package is that somebody will always have a kicker in there. I have some concerns with final offer selection on an issue-by-issue basis. I have been thinking about this a lot and I have not come across a grand solution. If someone had a grand solution to this, I am sure he would have proposed it. Final-offer selection puts more pressure on the parties to come to an agreement. You need final-offer selection with some kind of net arbitrator who would sit down the way a judge does in a pre-case and say, "If you stick to that position, I am going to go to their package." It takes a very talented guy to do that. I do not know if there are enough talented guys around. If you have that kind of pressure and he also has the final say on it, then you are going to get somewhere in that kind of process.

Mr. D. R. Cooke: Can you give us an example?

Mr. Sargeant: Let us say management puts a reasonable wage package before us but says there will be no seniority recognition. You can fool around with the game. I am doing the ultimates. I am not saying they do that. Let us say a union puts forward a terrible clause that everybody is entitled to a job regardless of whether he is qualified, but also includes a very reasonable clause on wages. You get positions you cannot live with.

Mr. Gillies: You want to take part of it, but you do not want to take all of it.

Mr. Sargeant: Exactly.

Mr. Potts: I would like to comment on final-offer selection. It is fair to say that the experience in many jurisdictions in the United States, mostly with the public sector, has been that the final offer, if it is going to work, works best with mature bargaining relationships for the simple reason that the parties have the sophistication to narrow down those numbers. There may be only three or four and the final-offer arbitrator can analyse them carefully. If you end up in a first contract situation with 75 proposals on one side and 95 on the other, it is just a hopeless mismatch.

Mr. Gillies: That is an excellent point. This may be the last place you want to explore that.

Mr. Sargeant: You will find that the arbitrators themselves would hate you if you ever did that, but that is not my--

Mr. Gillies: True enough.

Mr. Sargeant: Who wants to be put in that position?

3:40 p.m.

Mr. Gillies: Okay. You made a very interesting point on section 40a. The wording in subsection 1 states that either party can make application to the board and say, "We are not getting anywhere. We want to go to the arbitration process." Then in clauses (b) and (c), as you pointed out, the board considers failures or an uncompromising attitude on the part of the respondent. The way I read this is that you make your argument that the other guy has been the bad guy in the piece, whereas, as you pointed out, you could be the most unreasonable SOB on the block, but that might not be considered by the board at that point.

Mr. Sargeant: In fairness, it may be without reasonable justification. I do not know.

Mr. Gillies: I wonder whether clause (b), instead of reading, "the uncompromising nature of any bargaining position adopted by the respondent," should read, "adopted by either party." Similarly, perhaps clause (c) should be, "the failure of either party to make reasonable efforts." I do not know. If anyone has any reason that should not be, I would like to hear it. That just strikes me.

The point you made on subsection 11 is interesting. I am sorry our ministry representative is not here because I cannot believe the ministry really means that at the termination of a dispute, if there have been changes at the work place and the available job is for a tool and dye maker, under this act a welder can be put into that position. I cannot imagine that is what--

Mr. Sargeant: I am sure it is not. I am sure that is why they have "for the purpose of allowing the employer to resume normal operations." That is in clause (b).

Mr. Gillies: You are suggesting it should be more clearly worded so that people would be placed back in order of seniority, but they would be placed back in jobs for which they were trained and qualified.

Mr. Sargeant: And for which there was need.

Mr. Gillies: All right, let us leave it at that. I want to commend you on your brief because you have raised a lot of very interesting points.

Mr. Sargeant: I am sorry; I find that I missed one. While we are close to it, subsection 13 is the direction that working conditions are not to be altered after direction has been made. I want to comment on this.

After the conciliation process has been gone through, the employer is entitled to put new terms and conditions of employment forward. In the case of a small employer, those terms and conditions may be less than they were. Because of economic terms, he may have been arguing for something less than what was in place. If he legitimately puts those forward under the act, then because a direction is made, it is very unfair to put him back into what we call a freeze position and make him reinstate the wages that were in place at the time if he has no union agreement. To me, that clause is very unfair, especially if you get down the road when these new conditions have been in quite legitimately for two or three months. If the arbitration board feels it is justified, it can make its order retroactive or whatever. To make the employer put in the freeze conditions again is very unfair.

Ms. E. J. Smith: Where is this?

Mr. Gillies: Subsection 13.

Mr. Sargeant: One must remember that freeze conditions under the act are somewhat different. Let me talk about this for a minute.

For instance, you have certain proposals for wage increases that come up annually and it has been held by the board that you are altering the freeze conditions if you do not put them in. Now look at the situation. You have been on strike for three months and you want to put in lower wages. All of a sudden this rule comes down and you are put in a freeze condition. The union says, "You have to institute new increases because that has been your practice." Your total conditions are frozen. There have been some arguments on this on freeze conditions.

That section really needs to be looked at. I do not think it is fair. If direction to arbitration is given to that, the arbitrator can deal with the problem, but I do not think the employer should be forced to put back the conditions of employment that existed at the time of the notice when he has legitimately put in new conditions.

Mr. Gillies: I see your point. I think what the bill is trying to do is to avoid deliberate and malicious changes. We heard in London yesterday--

Mr. Sargeant: I know. There is a two-way street on this.

Mr. Gillies: You know how it goes. The workers are on strike and while they are away, the employer takes all their stools away so that when they come back to work, they have to stand up. None of us wants that. On the other hand, I guess what you are getting at is that they are working on piece of equipment A, perhaps unrelated to the strike. It is replaced with piece of equipment B that is more modern. Is that a change in working conditions?

Mr. Sargeant: Most probably not, in fairness to you. However, funny things have been held to be changes in working conditions--availability of parking in the lot and those kinds of things. There is a whole coterie of law on it that suddenly you are swung back into. It might be very difficult to implement, depending on what you put in.

Mr. Gillies: Quickly, you raise some interesting points on subsection 15. In regard to the (a) clause, I find it very interesting that the Ontario Nurses' Association, arguing as a strong proponent of this bill, had a real problem with that clause. Speaking more from the employers' point of view, you have a problem with it too. We may be on to something here.

Mr. Sargeant: I have a problem morally. I do not think it belongs. I do not think an arbitrator would think it belongs either.

Mr. Gillies: We will have to go through all the briefs, but if we are getting some questions about that one from both sides, we may want to look at it.

Ms. E. J. Smith: It is one that the ministry too suggested we take a close look at, as a matter of interest.

Mr. Gillies: Good. Finally, you raised a really not issue. I do not want to get into it at any length, but the ability to pay is something that, as I recall, was brought into play in certain types of arbitration several years ago.

Mr. Sargeant: It was brought into play in the most recent compensation restraint act.

Mr. Gillies: That was it.

Mr. Sargeant: It was brought into play because many arbitrators there said that it had no relevance because you are publicly financed and so forth. Be that as it may, that is a whole different argument from a public sector point of view. They had not considered it because of those reasons. Surely in the private sector those kinds of arguments have no relevance whatsoever, whether or not you believe that argument for the public sector. I do not propose to debate that, but it has no relevance in the private sector.

Mr. South: Mr. Sargeant, I was very interested in your comment at the beginning of your presentation to the effect that unions get certified automatically under the present rules of the game. Why do you believe this? What is the imbalance that the unions have?

Mr. Sargeant: It is hard to argue, and I do not plan to in this committee because it is probably not here. In the United States there is a vote before a union is certified every time. Under our law if the union submits cards that are signed by 55 per cent or more, it is entitled to automatic certification. Without getting into an argument about whether that is good or bad, consistently throughout the years the employers' point of view has been that there should be a vote in each case and then we would know.

The unions have argued that if there is a vote in every case, there is hanky-panky going on, so we should have this automatic certification or nobody would get certified. In the majority of certifications now there still is a vote procedure if you have less than 55 per cent and more than 45 per cent. Usually unions do not apply unless they have the cards in place, and in most cases--I do not know the statistics entirely but I suspect up to 90 per cent--they are what we call automatically certified.

I admit that the small employer who thinks he has been the grandpapa has a hard time with that. Conceptually, he does not believe it. There has been no vote, he does not see that, he just sees cards and he is under the impression, and the argument goes, that employees have signed these cards because of peer pressure or whatever, and they have not meant it. I do not wish to get into that debate because I do not think it has anything to do with first-contract legislation.

The only thing it does have to do with is, if you get automatically certified and then get guaranteed a first collective agreement because they arbitrated against you, you are going to have a lot of small employers out there wondering what this government is doing to them.

Mr. South: How do the other jurisdictions that have votes register the vote?

Mr. Sargeant: We have votes here in certain circumstances. You agree on who the bargaining unit is and the ministry sends it in.

Mr. South: Is it a private vote?

Mr. Sargeant: It is conducted by the ministry.

Mr. South: By ballot?

3:50 p.m.

Mr. Sargeant: By secret ballot. Then they just count them up.

Mr. Taylor: I want to express my appreciation for your brief and comments. In many way it manifests the reasons for the Conservatives' position on the bill; that is, voting in opposition to the principle of the bill in the House.

Mr. D. R. Cooke: We are grateful you found some reasons.

Mr. Taylor: Thank you for interrupting; that assists me as well. As a matter of fact, it reinforces some of the comments I have made during the past number of weeks in these hearings and some of the questions and responses I have tried to elicit from some of the witnesses.

What troubles me is that I have not been truly able to identify the extent of the evil we are trying to address by this legislation. Surely if we are going to legislate in what in my view is a very profound way--that is, by imposing a contract rather than arriving at a freely negotiated contract--that is a great deviation from the principle of the process both from a union point of view and from a management point of view.

Again, that is how I understand it. I have already confessed that I know very little about labour relations and less about labour law. When we have experienced strikes in Ontario, such as those at the Toronto Transit Commission or by the elevator operators and so on in the past, there has been consistent resistance to the imposition of legislation that would force a settlement. That resistance has come from organized labour and from the New Democratic Party.

Here we have a seeming urgency and a very keen desire to provide now for arbitrated settlements, and I have not been able to identify that evil. After looking at some statistics we received yesterday after some prompting, we find that in the year 1983-84 the total number of nonconstruction industry certifications for which information is available, excluding negotiations in progress, was 344. Of those 344, 306 achieved first agreements. Of the remaining 38, eight firms went out of business and their plants were closed. In the remaining 30, first agreements were not achieved because of the termination of bargaining rights or because negotiations lapsed.

That is hardly a compelling reason for the severity of the legislation that is before us today. Can you assist me in trying to uncover some sort of motivation or reason for the change in principle or philosophy?

Mr. Sargeant: This is my brief. You are speaking to convert it, I guess, in fairness. I have very great difficulty in finding any reasons for it. As we said, I think it is overreacting to a couple of situations. Not all employers have been clean; I would be loath to say that. But the board has put forward very effective remedies, and those remedies are in place. I do not see the overall necessity for this act.

Let us speak nonestly. From a union point of view, it is obviously wonderful to have it. It is a great organizing tool. In a sense, it is an organizing tool that I can put forward to employees and say: "You do not have to go on strike to get better conditions. You always have a way to go to get compulsory arbitration. It will not cost you anything."

Let us talk about self-interest. If I were in the union position, I would be putting this forward because it is a very strong organizing weapon that one can use. I do not begrudge that. That is the nature of this ball game. However, as far as needs go, I do not see those needs.

We have mentioned some of the employers we deal with. For instance, at Fleck there was a long strike, but there was an agreement there. There has been a second agreement and a third agreement. It did come about. It took a strike, but there were agreements. We have had Radio Shack where there was an agreement, and there are agreements that were hard, tough, and going for the second time around.

What the act suggests--and I do not know; one has to look at this in a bit of perspective--what I think the concern is, and what I do not think is recognized, is that there is a difference between hard bargaining and what some people out there may think is fair. Some people may not think it is fair for somebody to get \$5 an hour, \$5.50 an hour or \$6 an hour, but maybe that is all they are going to get from the employer's point of view.

From the employer's point of view, it may not be fair that he has to pay \$8, but if you are in a satellite industry that is providing parts to Chrysler or General Motors, the United Auto Workers comes in and says, "You have to pay this or forget it." It is not always the employer that has the strong bargaining power. There are times when we have to eat a lot of things on our side too, but that is the nature of what the process is all about. We seem to be trying to institute something else as a different process so maybe we can turn the whole system over to a different system.

What is reasonable? Is it reasonable for an arbitrator to say, "If you take the rate of inflation, you take this, you take that and you compare this, what will be fair"? That, to me, is not bargaining in many ways. It may be bargaining in justifying your position but it might not be bargaining.

The fact that you might go to arbitration and get something better is surely no reason to impose it. It seems what this issue is coming down to a little bit is saying, "We do not have the strength to do it on our own; so give us something so that we can get better conditions".

It may be equally true from the employer's point of view where it will say, "The union is asking too much, so I will use the system too." Frankly, I do not think that is the way the system should be used. What we are into and what we have recognized, and on the whole I think it has worked remarkably well, is the process of economic determination. When you come down to the justification, it is, "Am I going to strike over the issue or not?" Then the employer asks, "Can I take a strike on this issue or not?"

The labour relations board has recognized that there is a difference between what is called hard bargaining and what may or may not, in somebody else's terms, be reasonable. This bill is going away from that in the first bargaining, which we do not ask in other sets of bargaining. We ask as number one, and I agree with this, that one should recognize unions. One should not bargain to get away from unions. One should not bargain to do this or that; that is bargaining in bad faith. Those are covered by the act.

I do not see the justification. I think this is putting a different type of emphasis into the process that has not been recognized by this province. A situation of first collective bargaining should be introducing a system so both parties can get introduced. The employer can say: "Because you people

have joined the union does not mean you are going to get better terms and conditions than what I have been paying. I have the hammer. If I want to pay you \$5.25 an hour, that is what it is going to be. You can have your union, you can have your justification, we will have checkoffs, we will have the whole business. I would like you to be represented. Frankly, I would not like to pay you on the ability to pay."

The union could come in and say: "Sam, I know that you may not be able to afford it, and we do not want to put you out of business, but we are going to reduce your line so it is almost negligible. I want the \$9 and I am going to get it."

We have to recognize that in bargaining, all sides do not come in equal at all times. In a sense, this is trying to put an equality principle in the first collective negotiations, into an arbitration process. It is not collective bargaining; it is something else.

Mr. Potts: I want to address the question Mr. Taylor raised. Mr. Sargeant talked about what he perceives as a good organizational tool. I am sure you have been presented with briefs from unions that have made exactly that point. Maybe on the basis, as a social policy or as an organizational tool, the act could be justified. That is a strange way of going about providing an organizational tool but, none the less, there it is.

You may have these numbers in front of you--they are Ministry of Labour statistics--but of the 33 agreements imposed in other jurisdictions before 1981, only one continues in operation. That does not suggest to me that the employer has necessarily been digging away at the union all that time. Rather, the support was not there and the protracted negotiations were part and parcel of the fact that the support was not there. Once the agreement was imposed and once it ran its course, the employees exercised their democratic right to decertify the union; that was the end of the relationship. A number of other jurisdictions do not see it as a good organizational tool at all.

4 p.m.

Mr. Taylor: What I am trying to struggle with is the identification of the evil. Is the evil a strike? I have heard in past submissions that the evil is these protracted, ugly, unwanted strikes. That has been one suggestion. Then there are suggestions that it may be something else. It is a matter of identifying that evil. If I can identify it, I may be able to solve that in some other way, because that evil seems to repeat itself in second contracts or fourth contracts.

Mr. Sargeant: In fairness to you, what a union would argue with you is that the evil they see in first collective bargaining, if there is a strong employer who has a hammer, e.g. Eaton's, is that the union is forced to take such a lousy contract that it will not be able to establish a working relationship and will be decertified almost immediately, forced to take a long strike, forced to do both or forced to abandon it. I think that is, in fairness, what a union perceives as the evil.

In a sense, that is interesting. It gets back to my point. You get into philosophical views. If that is the evil we are trying to correct, if we do not think--in some places we are trying to place our judgement--a union should be able to take a lousy collective agreement, if we do not think that is fair and that somehow there should be a fairness aspect to this, we should have a third party there arbitrating what these people should get on various criteria, terms and so on.

To me, that is a wholly different system. It has not been justified to me in this province by the attitudes of employers. Employers and unions both--and I will say this--have been very responsible on the whole in coming to first collective agreements. That evil is not there. However, I do say that if this contract legislation is put forward, we are going to get fewer voluntary first collective agreements.

Mr. Taylor: Do you think you will get a proliferation of unionization of small businesses?

Mr. Sargeant: Maybe. It certainly is a useful bargaining tool. That is not what concerns me; that is fair enough. If employees want to join unions, that is terrific.

Mr. Taylor: Nobody is arguing against that. That is contemplated by the act. I was wondering whether selling the legislation would prompt a proliferation of activities.

Mr. Sargeant: I think so. It is much easier to tell employees, and for good reasons: "You will not have to strike on this; we will get you a first contract. We will guarantee you a first contract because this act gives a right to apply. There will be never any economic pressure on you. You will get your pay retroactively and so forth." What is missing from that quota, from the employer's point of view, is that he has the same kind of bargaining pressure to deal with. They are not taking the risk of losing wages for two or three weeks or whatever. That is the process.

Ms. E. J. Smith: To take that up, you mentioned the philosophical thing. I agree; I do not think there is anything wrong with seeing that there is not an imbalance that is so heavy in some cases as to create injustice. That is what the bill is about. I do not have any problem with saying that.

I agree with your point that the imbalance could conceivably be on the part of the small employer with a big union. If that existed, it would be redressed. We have heard a lot from the bigger unions. They have said to us they do not bring in big settlements such as they have in their own major plants but, rather, small settlements suitable to small businesses. I am taking only their word for it, but I am assuming that could also be addressed in this situation. Therefore, philosophically, you are looking for a fairer balance in the first settlement.

You were talking in the first place about about the business of how, before you go to arbitration, you may have already given up certain positions in your negotiations. Under this act you would not give up any positions; rather you would keep in your strongest position so when you go to arbitration, you would have your strongest face forward.

I thought that was why labour negotiations were done so completely in confidentiality and secrecy. If you do not resolve it, you go back to square one, and the things you have discussed, since they were not agreed upon, are no longer part of your position. I thought this is the way it was. I would like you to correct me if I am wrong.

Any negotiations I have ever been involved with were negotiations with the city hall's union. My impression was that nothing was ever allowed out because this very situation you have suggested would occur. People will not give at all because it might become--

Mr. Sargeant: You are right in a sense. You do have a process. Negotiations usually are held in camera and people take positions. When you go before an arbitrator under the Hospital Labour Disputes Arbitration Act, he usually does not know what has gone on in the bargaining. He has the issues and the positions before him.

Ms. E. J. Smith: That could be bad.

Mr. Sargeant: He has your original position and their position; he does not have the compromise positions that go forward and backward. The problem we have found, though, is that one does not get to bargain the compromises because there is no incentive. There is no incentive to start packaging your, "I will do this if you will do that," and so forth.

There is not the same incentive to start finding compromise positions if there is compulsory arbitration behind you, especially in the case of a new employer. The new employer says to me as a consultant: "Why should I give up anything and do this? I might as well keep to the strong position." There is not the same incentive. That is the only point.

Ms. E. J. Smith: We are hearing presentations on the two sides. You are saying there is no incentive to settle. The other side says they should get to arbitration immediately.

I could go back to some of the comments when the bill first came in which suggested we had a happy medium. There was enough disincentive for a strike to make people work at a bargain; yet the fact that it was there would make an employer possibly more willing to recognize an obligation to bargain. This is a first-contract problem; an employer who says, "Why the heck should I have to bargain?"

Mr. Sargeant: That is a different quality, though.

Ms. E. J. Smith: We are talking about the fact that it was only 38 out of 344; it is the hard-case situations we are looking at.

Mr. Sargeant: I suggest to you, and nobody is going to prove me right or wrong until we go forward with this, that there will be far fewer settlements and first contracts than there are now.

Ms. E. J. Smith: I am hearing that and I am worried about it. Still, we all have been in the position to see your few might become such a heavy problem. As we all know, all those statistics can be used every which way. The ones that are not settled make up a small statistic, but the other statistic we get is what a big percentage of strikes come in the first contract. That is the balancing statistic.

Mr. Sargeant: On the other hand, there are some of the high-profile ones. For instance, it seems to me the United Steelworkers' brief mentioned the Shaw-Almex Industries Ltd. dispute. That is about the third or fourth agreement; that is not even a first-contract relationship.

Ms. E. J. Smith: I am talking about the first-contract ones.

Mr. Sargeant: I am saying some of the high-profile ones are not first-contract ones.

Ms. E. J. Smith: No, I am strictly talking about first contracts.

It is clear to me what the freeze condition in subsection 13 is trying to prevent. I do not see it as a problem. This means you go back to the status quo until you settle your agreement. It prevents punitive side measures by the employer which put undue pressure. I have trouble knowing what you are suggesting instead of that. I understand clearly what it means. I do not know what abuses you think are going to put in there that we should reword it to prevent.

4:10 p.m.

Mr. Sargeant: I can understand the concern on that level. This is the problem you get into. It gets very difficult. On the other hand, let me put a scenario to you, because we have had this occur.

Suppose an employer, because of hard times in business or because he has a new business or whatever, is paying some guy \$10 and wants to negotiate \$9.50, just to put it into a silly perspective for a moment. He institutes the \$9.50 afterwards. This says he has to put back the \$10. Let us suppose the arbitrator decides the \$9.50 is correct, based on all the evidence. Does he go and get it back from the employees retroactively?

Ms. E. J. Smith: No, because that is part of the first collective agreement.

Mr. Sargeant: That is the problem I have.

Ms. E. J. Smith: I gather you are presenting a scenario where he was paying \$10 and then they discussed this, that and the next thing, maybe holidays with pay and all kinds of wonderful things, and the pay drops down to \$9.50. Obviously, there are some good reasons, things that have come out, to make that justifiable. That is all part of a new agreement. Assuming the new agreement went retroactive, then so would the lower pay.

Mr. Sargeant: How are you going to recover that? I just ask you the question. I do not know. It is very difficult to recover.

Ms. E. J. Smith: I assume that then neither of you would agree on retroactivity.

Mr. Sargeant: However, the arbitrator can award it.

There might be lots of other conditions; for instance, the one I gave you about the wage increase. With regard to these freeze conditions, it has been held that if you have been getting your wage increase every June, it breaches the freeze conditions if I do not give you another increase in June. If it happens that the freeze condition is over in May and we strike for a while and then you put back the freeze, am I obligated now to put in an increase even though I am going to arbitration? It presents some real problems. These freeze conditions are not as simple as you think. Lots of things are caused by a freeze. You cannot change working terms and conditions.

Ms. E. J. Smith: This is a nonunionized company, so it probably does not have a very complicated agreement on working terms and conditions.

Interjection: Then they are unionized.

Ms. E. J. Smith: No, it is a first agreement and they have not made a contract.

Mr. Sargeant: It is a first agreement, but they do have terms and conditions.

Ms. E. J. Smith: Let me get this clear. In subsection 40a(13) we are talking about a first agreement, so they do not have a contract and they have not made a contract, which is in the last three words.

Mr. Sargeant: The terms that are frozen are the terms they had in place. They have terms in place. They have annual increases. They have vacation policies. They have all kinds of policies in place. Those are the things that are frozen.

For instance, I had a case in front of the board where we had Saturday overtime work for people. The board recognized that because of economic conditions we could not do that. However, we were in freeze conditions so the board said, "You had a practice of Saturday work; you cannot stop that practice." If I were in freeze conditions and had gone past the freeze and instituted a new work week in which I did not have Saturday work for good business reasons, and the freeze gets plunked back on, do I have to start Saturday work again?

Ms. E. J. Smith: Were you not on Saturday work when it started?

Obviously, you and I are not negotiating every contract. I am assuming the details of the kind of thing you are talking about are going to be part of our first-contract agreement or else we are not going to reach an agreement; we are going to arbitration anyhow. Otherwise, we are going to work out these details. How can you correct this other than our getting into things such as Saturday work? How would you correct subsection 13 and still leave in prevention of the abuse that is possible as a pressure method? We are trying to improve an act. I know what the intention is.

Mr. Sargeant: I do not think you need subsection 13. There are remedies under the Labour Relations Act whereby if you put in terms and conditions that were so onerous it would be bargaining in bad faith or whatever, and there are other remedies under the act. There are all kinds of things a union would be very quick to bring forward. I do not think you need the freeze.

Ms. E. J. Smith: They do not have a union.

Mr. Sargeant: Of course they have a union.

Ms. E. J. Smith: They are negotiating a contract.

Mr. Sargeant: But they have a union.

Ms. E. J. Smith: They have been certified; okay.

Mr. Gillies: They are there; they just do not have a contract.

Mr. Sargeant: Other remedies are available under the act, if you are trying to do it for those kinds of purposes.

Ms. E. J. Smith: You have no specific improvements you would recommend to this. You would just recommend getting rid of it.

Mr. Sargeant: Delete it.

Ms. E. J. Smith: That is all. I just wondered whether you had any suggestions for improving it.

The only other point I want to mention briefly is the ability to pay. We have had it pointed out to us so often that obviously the workers themselves are not going to try to demand wages that cannot be paid, and if an employer demonstrates an inability to pay, they are not going to ask for it.

Mr. Sargeant: I suppose we live in an ideal world where one says that is true, but a lot of times in the negotiations nobody believes it.

Ms. E. J. Smith: In Germany they have labour on their boards so that they know what the ability to pay is. I believe that is right, is it not?

Mr. Taylor: On the board of directors?

Ms. E. J. Smith: Appointed to the boards of directors.

Mr. Sargeant: It was very interesting. They tried that in the United States and the poor guy, Fraser, was really--that is a whole new concept; I will not get into that one.

Ms. E. J. Smith: I know. I just mean it is not so ridiculous.

Mr. Taylor: The directors do not make the decisions.

Mr. Sargeant: They have a different system in Germany.

Mr. Chairman: In view of the time, we will put that aside. The final comment, Mr. Mackenzie.

Mr. Mackenzie: I will pass.

Mr. Chairman: I think we had best move on, then. Mr. Sargeant and Mr. Potts, thank you for your presentation. It was thoughtful and at times provocative.

Mr. Sargeant: Thank you. I enjoyed having the opportunity to present it.

Ms. E. J. Smith: I thought it was a very good presentation, even though I did not agree with it.

Mr. Taylor: Just because you work Saturdays, that is all.

Mr. Chairman: The next presentation is from Fitzhenry and Whiteside Ltd., the publishing company. We have Robert Fitzhenry with us.

Mr. Fitzhenry, thank you for coming before the committee. We welcome your views.

FITZHENRY AND WHITESIDE LTD.

Mr. Fitzhenry: Good afternoon. As president of Fitzhenry and Whiteside, I am a Canadian book publisher and I am a small businessman. Our firm employs about 100 persons and we were certified in two bargaining units last fall into the Toronto Typographical Union.

I am grateful for an opportunity to present our case here this afternoon. I feel a bit like a concert pianist who is asked to give a concert while learning to play the piano. We have been in negotiations since last fall. We have had 14 meetings and we have yet to get to salary considerations or job classifications.

Each one of these meetings has involved four members of our staff on the union side and three members of our staff on the management side. There are seven members. In the case of the union members it always involves a full day, because if the meetings are suspended prematurely, union members of our staff retire for private consultations. To be sure, the TIU has agreed to reimburse our salaries for the union members, and so far it has paid about a third, or through January. Of course, reimbursement is really a minor part of the problem. The major part is the loss of time for both union members and management. That bleeds us.

Fourteen meetings of seven hours a day, let us say, for the union and an average of five hours a day for the management means that we have lost more than 17 man-weeks, and there is a lot more to be lost in time. Of course, this loss is in addition to the usual absenteeism for illness and personal reasons.

4:20 p.m.

For instance, on February 24, when we had a bargaining meeting and four members of our warehouse were at the bargaining meeting, we had a total of 11 persons absent from our warehouse with excuses, with reasons such as visits to doctors, hospital checkups and one thing or another. I might say that on that afternoon, the official bargaining session was over at 1:30 p.m. Yet not one of our four members returned to our warehouse, which was a mile and a half distant.

In addition to enlarged absenteeism, we feel the quality of our work is suffering. On February 28, we received a letter from Paragraph Book Store and Cafe in Montreal that says: "Most of the books in this shipment appear to have been put through a paper shredder and trash compactor. Three of the books were clearly another store's shopworn returns, with the store's prices marked in pencil. Please arrange to have books cited replaced as soon as possible."

That is an expensive and disheartening letter to receive. Apparently, neither our pickers nor packers exercised the elementary and rudimentary care to see that saleable books were sent to our customers. Incidentally, it costs three times as much to accept books for return as it does to ship them. That is just the logistics of the case. At present, we have 40 skids of returns, which computes to somewhere between 24,000 and 25,000 books, which we have yet to process. The head of our returns department is on our bargaining committee. When customers do not get credit for their returns, they do not pay their bills.

Furthermore, we feel we are suffering from a slowdown. This is not something we can really prove, but after 20 years in business we are able to appraise performance with a fairly practised eye. We are more seriously behind in our orders than we have ever been at this time of year. This kind of backup usually occurs in the fall, when we are doing twice as much business as we are now. In the past, it has always been our practice to ask our office staff to help in the warehouse. I myself have gone with a management team to the warehouse, with profit; we have always learned something while we were aiding the fulfilment process. However, the union feels that is illegal because we have two bargaining units. One bargaining unit should not be helping or interfering with the other.

It is an axiom that unions are less interested in production than management is, despite the fact that the great labour leader Samuel Gompers said, "The worst crime against working people is a company which fails to operate at a profit." As we know, production is profit. It falls to management to absorb production losses and take the blame when they occur.

Your committee is up to its eyeballs in briefs. It behooves me and my firm to make as brief a brief as possible and we are trying to do this. Still, we ask you to walk a mile in our moccasins, because we feel we have been much more willing than the union to negotiate. After 14 meetings, with salaries and work classification issues still not addressed and the union still insisting on bargaining during business hours and refusing to bargain after them, we feel we are being bled by the loss of staff time, the general slowdown and eroding morale. Therefore, we applied for conciliation.

We ask: "What is the union's game? Why is the pace so leisurely?" One always reads it is management that is the recalcitrant one. We submit that the union is in no hurry because it sees the passage of the first-contract legislation as so assured that by late spring first-contract legislation will be in place and a contract between Fitzhenry and Whiteside and the Toronto Typographical Union will be imposed. Moreover, this contract will extend for two years and its salaries and job classifications can be made retroactive. Yet we cannot raise the price of our books retroactively.

The union says: "What is the rush? We have them weakened and bleeding. The longer this kind of sitzkrieg ensues, the better." As we heard earlier this afternoon, the union has no risk in the situation. It does not have to put its principles on the line with work stoppage. As my predecessor said, there is no economic determination.

In his statement to the Legislature on the proposed first-contract legislation on November 26, 1985, the Minister of Labour (Mr. Wrye) said: "I am not suggesting a risk-free alternative to the present system. By its nature, bargaining is an adversarial process, and participants must be prepared for sacrifices that may be necessary to advance their interests at the bargaining table."

We ask, where is the sacrifice in the present TTU slow negotiation tactics? The minister went on to say: "At the same time, it is vital to preserve the incentive for parties to try to negotiate their own agreements...The employer and the trade union are best qualified to decide what terms are essential to an effective day-to-day relationship."

As an employer, how can Fitzhenry and Whiteside negotiate with the TTU as a trade union when the TTU apparently does not wish to bargain seriously?

To be sure, when the TTU was certified at Fitzhenry and Whiteside, the management was surprised. We did some self-analysis to determine why we were surprised. We found our job entry levels are low and we are more than willing to address this problem, but after 14 meetings we have not been able to get around to it.

Incidentally, while our entry levels are low, our total wage package at 16.9 per cent of sales is better than the average of 15 large Canadian publishing houses, which is 16.5 per cent. On the other hand, our executive compensation is low or lower, with general and administrative costs at 5.9 per cent compared to the average of 6.9 per cent for these same 15 publishing houses.

In total, we are paying out more to the whole staff, but apparently we are not paying out enough to our new members. Within the constraints of our average one per cent net profit for the past six years, we are willing to amend this, but there has been no opportunity, not even at the first conciliation meeting, which was held yesterday. Our team arrived at the hotel at 8:30 a.m. to review the union's wage package and the rest of its proposals for the meeting scheduled at 10 o'clock. The meeting did not start at 10 o'clock. It did not even start at 10:30, 11 or 11:30. It started at three o'clock. At that time, the TTU really did not have a proposal. Naturally, by the end of the day we had not got to wage or salary classification proposals.

We have no philosophical objections to unions. Last year, we published the Eaton Drive, a book by an Eaton union organizer that went into two printings. I am probably the oldest person in this room. I clearly remember the urgent need for unions during the Depression, but unions have come of age.

4:30 p.m.

I think we all know this legislation is destined to pass. Many of us are opposed to it. We believe it is unfair in that it removes the adversarial test of strength component necessary to good bargaining. It is unfair because it extinguishes the employer's right, at the risk of strike, to say no and it forces us to accept a contract based on other collective bargaining agreements. There is none in our type of publishing.

However, nobody said this world was fair. We know, moreover, that the United States has had compulsory arbitration in many of its public services for 10 years--and I am sure you have heard this many times during the many hearings that you have held--and that 450 or so first contracts are now in force in the US. We know that respected surveys show these contracts specify wage increases which are 16 to 61 per cent above the prevailing rates.

In our labour-intensive company--and please remember that a computer cannot read a manuscript, nor can a computer take a book from a book shelf, pack and ship it--where there was an average of one per cent net profit for the past six years, a 16-per cent wage increase would close our doors. Though this legislation will doubtless pass, surely it does not have to pass in its entirety.

We submit no mandatory contract should be retroactive. We submit no mandatory contract should be for more than one year. The omnibus provisions of the pending first-contract legislation remind me of what Ambrose Bierce said about bigamy. "Bigamy is trying to get more out of life than there is in it."

Thank you.

Mr. Chairman: Thank you, Mr. Fitzhenry. There are some questions from members of the committee.

Ms. E. J. Smith: I find your presentation very good and very interesting. It raises points that we do hear.

Mr. Chairman: I would encourage you to speak up.

Ms. E. J. Smith: Oh, sorry. Hearing your case, I cannot help wondering whether you are one of the cases where it might seem that the union is stronger than management, and where what is proposed here would actually prove more beneficial to you than nonbeneficial. I am just taking your point of view on this. I am not trying to be an arbiter.

It would sound as if you are almost into bad-faith bargaining on the side of the union. Having said that, if it were true--rather than saying it is true--would you not then benefit by first-contract arbitration?

Mr. Fitzhenry: We do not feel we would because the adversarial component is removed. What is an arbitrator who comes in going to use for other collective agreements? There is none. What is he going to use as a standard?

Ms. E. J. Smith: I presume he is going to look at things such as your one per cent profit. I would be horrified if he came in with a 16 per cent raise, unless it is one per cent of such a huge amount that percentages are not relevant.

Mr. Fitzhenry: Yes, that is true. Let us hope he would look at that. On the other hand, we have had propositions where wage increases have been suggested which were simply impossible, even with firms such as Eaton's. Did not Eaton's say finally it was not going to put up with this kind of wage increase and offered to discharge half the staff in Brandon, Manitoba? I believe it did.

The Tandy television company--what is the name of it?

Mr. Chairman: Radio Shack.

Mr. Fitzhenry: Radio Shack, the same thing. Finally, the employees went for a freeze because the suggested wage scale was just too rich. The point I really want to make is that warehouse work is largely unskilled. We have probably 40 persons in the warehouse who are unskilled. God forbid, because some of them have been with us for some time, but the work would not be that difficult to replace.

Ms. E. J. Smith: Yes, I understand that.

Mr. Fitzhenry: I do not quite understand what hold the union would have on us in the event it wanted to strike.

Ms. E. J. Smith: You are suggesting they are doing such things as prolonging meetings, not attending meetings, creating situations that are financially very--

Mr. Fitzhenry: They know this first contract is not a prospect and they do not really have to earn it to get it. They do not have to threaten us with work stoppage. They are going to get it anyway.

Ms. E. J. Smith: I do not think that is the full intention here, but I will not address that.

Mr. Taylor: It is not the intention, but there is concern that it may be the result.

Ms. E. J. Smith: It might be the intention that immediate access would provide for that situation, rather than the present legislation.

Mr. Fitzhenry: They are draining us in the prospect. We cannot prove a work stoppage. We are trying to devise some methods. We know it exists. You cannot be in business for 20 years and not know when a slowdown is occurring. As I said, usually at this time of the year things are very smooth for us

because business is not that good. Yet here we are, backed up with 25,000 books which have not been processed.

Ms. E. J. Smith: Yes.

Mr. Chairman: Are there any other questions by members of the committee? Mr. Fitzhenry, thank you very much. It is good to have a small businessman, as you call yourself, come before the committee with very specific examples of his concerns.

Mr. Fitzhenry: Thank you very much. I am very grateful.

Mr. Chairman: That completes the agenda for today. We will begin tomorrow morning at 10 o'clock with Mathews, Dinsdale and Clark, labour lawyers.

The committee adjourned at 4:37 p.m.

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Government
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STANDING COMMITTEE ON RESOURCES DEVELOPMENT

LABOUR RELATIONS AMENDMENT ACT

WEDNESDAY, MARCH 26, 1986

Morning Sitting



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From the Canadian Manufacturers' Association--Ontario Division:

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LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Wednesday, March 26, 1986

The committee met at 10:12 a.m. in committee room 2.

LABOUR RELATIONS AMENDMENT ACT
(continued)

Resuming consideration of Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: We have two groups appearing this morning. The third group that was scheduled to appear, the Ontario Public Service Employees Union, has rescheduled to a later date so that we have only two groups this morning. The second group has agreed to try to come a little early so that there is no gap there. We have a full afternoon with three groups.

This morning we have with us Mr. Wilson and Mr. Binning from the firm Mathews, Dinsdale and Clark. Would you come up to the table? You gentlemen know that the Legislature has charged this committee with examining Bill 65, holding public hearings and proposing any amendments that the committee might, in its wisdom, decide to take back to the Legislature. We are now in the middle of our public hearings, and at the end of next week we will deal with clause-by-clause debate before reporting back to the Legislature when we go back in session later in April.

We welcome you here. We have heard your firm's name mentioned in dispatches and we are anxious to hear from you.

Mr. Taylor: In Ottawa, as a matter of fact.

Mr. Chairman: In Ottawa, yes. Welcome to the committee.

MATHEWS, DINSDALE AND CLARK

Mr. Wilson: Thank you. My name is Mr. Wilson. Mr. Binning, senior partner at Mathews, Dinsdale and Clark, is on my left. As you may know, Mathews, Dinsdale and Clark has a very active labour relations practice. We advise management. We are very active in the area of negotiating collective agreements, and we estimate that we are at the table some 175 times a year. We can also advise this committee that we are actively involved in interest arbitration. It is with this background that we come to you today.

In December we wrote to the Minister of Labour (Mr. Wrye) requesting an opportunity to discuss this bill with him. We have enclosed a copy of that in this brief; we will speak to it later. We thank the committee for an opportunity to put our views forward. We will deal with the issues we raise in that letter. We will deal in particular with two items in this bill that cause us serious concern. One is subsection 40a(2) of the act as set forth in section 1 of the bill, dealing with access to first arbitration, and the second issue is subsection 40a(15), which deals with the criteria on which the arbitrator will base his or her decision.

We would also be pleased to answer any questions you might have. We will at that time also make some comment with respect to subsection 40a(13), which deals with the freeze.

Let us then turn directly to subsection 40a(2), the access clause. You have the brief before you. We apologize that we did not get it to you earlier for you to have read it in advance. Perhaps we could walk through that at this point.

It is our understanding that the goal of this proposed legislation is to encourage parties to make a greater effort to negotiate their first collective agreement by providing for first collective agreement arbitration if there is an impasse. We would submit that it is widely recognized, however, that interest arbitration has precisely the opposite effect. It is widely recognized, we would submit, that there is a narcotic and chilling effect that is caused by interest arbitration.

We refer you to the 1968 task force report on labour relations, where it is indicated, "One of the worst features of compulsory arbitration is its potentially corrosive effect on the decision-making process." That committee went on to say:

"There will be a tendency," with interest arbitration, "to hold back a little for fear of establishing a new floor or ceiling for the arbitration. There will be an equal reluctance on both sides to concede anything lest it be something the arbitrator might force them to give in his award."

We can tell this committee, from experience gained at the table, that this is exactly what is happening now with the health sector: negotiations with nursing homes, homes for the aged, charitable institutions, scheduled institutions under the Developmental Services Act and hospitals. When one negotiates in those areas, there is a terrific narcotic effect. There is a tendency for the parties to say, "We will just hold back and let the arbitrator do it."

We would suggest that if indeed the intent of this proposed bill is to encourage more negotiations during first collective agreements, then we think it is going to have the opposite effect.

When we turn to clauses 40a(2)(a) to (d), that fear is reinforced. Mr. Failes, policy analyst for the Ministry of Labour, advised this committee on February 27 that clauses 40a(2)(a) and (c) essentially are the aspects of the bad-faith test that the Ontario Labour Relations Board would be applying in an application for bad-faith bargaining.

Mr. Failes continued that clause 40a(2)(b) is something different. He indicated that clause 40a(2)(b) introduces the concept of reasonable justification. We understand clause 40a(2)(b) to require the board to substitute its judgement about the reasons proposed by either party for seeking and resisting the contract language that has created the impasse.

We also note at this point, when we are talking about these four clauses, 40a(2)(a), (b), (c) and (d), that we do not agree with Brian Snell, counsel for the United Steelworkers of America, in his submission to the committee with respect to clause 40a(2)(d). Clause 40a(2)(d), you will see, is the catch-all; it indicates any other reason the board considers relevant as a basis for the parties to have access to first arbitration.

Mr. Shell indicated that clause 40a(2)(d) would be applied for those cases that are similar to clauses 40a(2)(a), (b) and (c); he made references to piglets and to other things. However, we do not agree with that, with respect to Mr. Shell, as we sometimes find ourselves not doing. We believe clause 40a(2)(d) means precisely what it says. It means the board can refer a matter to first arbitration for any reason it considers relevant, and it is not confined to clauses 40a(2)(a), (b) and (c). It is the totality of subsection 40a(2) that therefore defines the direction the Legislature will be giving to the board, and hence to the parties, in making access to first arbitration.

What does that mean? In the first day of hearings a question was raised by Mr. McGuigan about whether there would be access to arbitration in a situation where the employer claimed he would go out of business if he acceded to the union's position. That is found at pages R-25 and R-26 of the morning session of February 25. I will not go through that, but his concern was when the employer said: "I am going to go out of business if I accede to the proposals that are coming across the table. Do I have to go to arbitration?" Mr. Armstrong, the Deputy Minister of Labour, responded that, under the bad-faith bargaining provisions, the board would not make economic judgements on the business rationale proposed, but that subsection 40a(2), the subsection at issue today, gets the board into making such determinations.

10:20 a.m.

Mr. Armstrong continued that if the board found there were economic justifications, it would not grant first collective agreement arbitration. On the other hand, he said it might refer the matter to arbitration. The Minister of Labour indicated, "None of us sitting around here knows what the board will say in that event."

With the greatest of respect, we think this is a fundamental question that the parties should have answered and we have some concern about the direction the Legislature will be giving to the labour board when the Minister of Labour and the Deputy Minister of Labour come and answer the most basic of questions and say they do not know. We find that is not an appropriate delegation of responsibility to that board.

While we will have more to say about economic viability--Mr. McGuigan's point is that we cannot afford it--when we discuss subsection 40a(15), we submit in the circumstances that economic viability is not a criterion in that subsection, it is questionable whether it would be a criterion for the access under subsection 40a(2). Surely the board will say to the employer or to whoever is presenting the case, "You are telling us you do not have the ability to pay for this, but if we look at the criteria the Legislature says are relevant for the arbitrator, ability to pay does not enter into it." If ability to pay does not enter into it at that stage, why should it enter into it at this stage?

We think that is somewhat confounding. We respectfully submit that the board and the parties are entitled to greater guidance from the Legislature as to the basis for determining the access issue. Moreover, we respectfully submit that it is improper to introduce a system so lacking in guidelines and accountability that both the Minister of Labour and the Deputy Minister of Labour were unable to answer with any precision the most basic of questions.

What do we say should be the basis for access? If we are correct that interest arbitration is being introduced to further the overriding intent of the Labour Relations Act to encourage the practice and procedure of collective bargaining, then we submit that access to arbitration, if it is to be granted at all, should be limited to cases where either party has bargained in bad faith, that is, it has violated section 15.

In our reading of the record to date, we are left with a sense that this committee has been left with a sense that bargaining in bad faith is an empty process. It is a very difficult process to pin down and has no meaning. The board will not go behind anything; it is a very simple procedural matter. We do not think that is right. Section 15 of the Labour Relations Act imposes on parties the obligation to meet within 15 days from the notice or within such time as they may agree upon and to do two things. They have to bargain in good faith and they have to make every reasonable effort to reach a collective agreement. That is the law.

The board has said in a number of cases that this has two purposes. One purpose is to reinforce the obligation of the employer to recognize and deal with the exclusive bargaining agent, that is, the employer bargains only with that bargaining agent, and the goal of that bargaining is to obtain a collective agreement. The other purpose the labour relations board has outlined for the parties under section 15 is to require them to attempt to settle their affairs through a rational and informed process to minimize resort to economic sanctions. Nobody wants strikes or lockouts. The idea is to get that deal without having to resort to those impasse resolution mechanisms.

That has two parts to it, according to the board, and one is that the parties must communicate with each other. The other part, and we suggest a fairly fundamental part of the section 15 obligation, is that the parties must have a full, free, honest and rational discussion of the issues before them. We do not think those are empty words. We think that imposes a real obligation upon the employer and the union at the negotiating table.

Failure to reach a collective agreement is not bad faith. While the parties must share a common objective to enter a collective agreement, they may have differences as to what that collective agreement will obtain. The union may say, "We want these employees to be paid precisely the same amount of money as some other identified group." The employer may say, "We do not think we should have to become insolvent to reach that goal." Both parties may say those are reasonable goals of the negotiating process.

With respect to first collective agreements, the board is particularly sensitive to bad-faith bargaining. We suggest to this committee that there is a greater onus to bargain in good faith in the first collective agreement situation than there is in a renewal situation. While Mr. Armstrong has said the board will not look at the reasonableness of the positions, which is often the case, the board does have regard for the totality of the bargaining relationship. It does take into account their substance so that a patently unreasonable proposal, which has no business justification, may well indicate bad-faith bargaining. We would suggest to this committee that there is already an appropriate basis for determining whether the employer or the union is attempting to frustrate that negotiating process. There is a jurisprudence that exists. The parties know what that jurisprudence is and they can bargain according to that.

We think what is proposed goes well beyond that which already exists and introduces terrific confusion, a lack of understanding and a lack of guidance to the parties at the table. We do not think that is going to encourage first collective agreements; we think it is going to discourage it and make it more difficult.

Let us then turn to the second major point we would like to address this morning. That is subsection 15, which deals with the criteria that the arbitrator would use to determine a fair and equitable settlement. We have already discussed the above or made some passing reference to ability to pay or economic viability. If access is allowed, we submit that one would expect that the employer's ability to pay would be an important consideration.

If an employer says: "If we accede to this proposal, we are going to go broke. We are going to lay off our people. We are not going to sell our product;" we think that is important. If we have learned anything to date about the arbitral process, it is that ability to pay does not play a dominant part in the arbitrator's decision-making process. We submit that would be the particular case with the bill that is before this committee, because this bill conspicuously ignores ability to pay in subsection 15. It is not there at all.

When Mr. McGuigan says, "What about this employer?" and the Minister of Labour and Deputy Minister of Labour say, "We do not know what the board would do with access," we are telling this committee there is a very real likelihood that if it ever does get to the arbitrator, the arbitrator is going to say: "The Legislature is directing me to look at clause (a), (b) and (c). I do not see ability to pay as a listed item here, so I guess it does not matter."

Commissioner Peck of the British Columbia Compensation Stabilization Board has addressed the issue of ability to pay. He said, "A student of the subject will find that while such legitimacy occasionally assumes form, it is seldom dignified with substance, at least in British Columbia." In our experience that is the exact situation in Ontario.

On page R-35 of Hansard of February 27, Mr. Failes advised this committee, "It is fair to say that most private arbitrators prefer criteria in the legislation." It is far from clear to us on what he is basing that conclusion. One only has to turn one's mind back to the introduction of Bill 179, and Bill 111 in particular, in which there were two criteria, and to recall the hue and cry that arose in the arbitral community when they said: "Do not tell us what we have to look at. We are above the law. We will make our own decisions about what is fair and equitable. Do not wear your legislative committee hat. Put on your employer's hat." There is terrific resistance to arbitral criteria.

Under the Public Sector Prices and Compensation Review Act, which is often referred to as Bill 111 and was a sequel to the the Inflation Restraint Act, arbitrators were required to consider two criteria. One of those criteria was that the arbitrator was required to consider the employer's ability to pay in the light of existing provincial fiscal policy and to give his or her opinion as to the effect of his or her award on that ability to pay.

10:30 a.m.

Notwithstanding that absolutely clear direction, we saw case after case where ability to pay was ignored. In our brief on page 9 we simply cite a couple. There is the district municipality of Muskoka's case, a home for the

aged in Bracebridge. In that case, the arbitrator agreed that the act was required to reverse the practice of not considering ability to pay, which exists at present in arbitral jurisprudence.

Arbitrators say: "It is not my job. I am not looking at that." The arbitrator in this case said, "Bill 111 is supposed to reverse that." How did he apply that? I suggest he applied it exactly the way Commissioner Peck said he would; he ignored it. He awarded an increase of 28 per cent from January 1, 1984, to June 8, 1985. That home had a loss of \$76,795. Nowhere in the private sector are rates coming in anywhere near that. That is with a home that had a \$77,000 loss. In that case, the arbitrator said Bill 111 does not apply to the health sector, to homes for the aged in particular, notwithstanding that it had been brought to his attention in no uncertain terms that the act deals exactly and precisely with homes for the aged, and they are listed.

Let me give you another example: Sunnydale Home, a nursing home for profoundly mentally retarded children. The chairman in that case awarded an increase of up to 22 per cent over two years for a home that was operating at a loss. Just prior to the hearing, it was showing a profit of \$8,000 on a substantially larger investment. They had lost one bed, which brought them below the break-even line, as I recall. That was notwithstanding the dissent that stated:

"Uncontradicted submissions of the employer indicated that the employees' earnings have historically outperformed the earnings of other persons in their community. Data was also provided showing that private sector increases in Ontario were under four per cent for the relevant period. It was moreover demonstrated that the earnings of the employees in this home have historically outperformed the rate of inflation, which, for the period under review, was less than five per cent. It was also not contradicted that wages in this home in March 1984 were competitive with those of other nursing homes in the region."

We have two arbitrations for which there was a criterion dealing with ability to pay in no uncertain terms. Notwithstanding what Mr. Failes is saying, we suggest to you with great confidence that arbitrators ignore criteria unless they are manifestly clear. Let me reinforce that point and let me reinforce what we are saying about the disregard for established criteria by referring to the second criterion in Bill 111.

The act provided that the arbitrators must cost their awards. In their award, they had to include a statement setting out the arbitrator's opinion of the cost of the award. The arbitrator's opinion had to be in that award. We think it is reasonable to assume that it was the intent of the Legislature to require the arbitrators to turn their minds to the cost of the awards before they issued the awards. We think that is a reasonable interpretation of that act. We think it is full of common sense.

We can tell this committee that is not what happened. Time and time again, they ignored that criterion. We cite the Sunnydale case. We cite the Waterloo Regional Police case. In the St. Mary's General Hospital case, cited on page 11 of our brief, we find the arbitrator saying: "We are required by the Public Sector Compensation Review Act to provide costing for our award. We remit the matter to the parties to cost this award, and to file that costing as required by the legislation." It is too late by then; the award is out.

In a letter of October 8, 1985, Mathews, Dinsdale and Clark wrote to the Treasurer of Ontario and the Minister of Economics (Mr. Nixon). We advised him

of these and other concerns about the arbitral system. Mr. Nixon responded by advising us, and the letter is included in this brief, "The government is cognizant of the issues that you have identified and we are currently examining the various ways in which they might be addressed."

The Treasurer sent the letter to the Minister of Labour (Mr. Wrye), and we sent a follow-up letter to the Minister of Labour. The Minister of Labour responded that he was "sympathetic to [our] suggestion that there are outstanding problems with the present system, such as a lack of consistency between awards." He continued, "A review of collective bargaining pursuant to the Hospital Labour Disputes Arbitration Act continues to be a subject of concern to my ministry." That act applies to nursing homes, homes for the aged and so on.

In the light of the honourable member's awareness of the flaws in the system, it is of more than passing concern to us to see this same process introduced into the private sector. We are at a loss to be able to explain to our clients why that is so. We simply do not understand logic that says, "This system is flawed," where the Treasurer says, "This system has problems," where the Minister of Labour says, "This system has problems," and the Minister of Labour comes to this committee and says, "We do not know how this act is going to work," and it is going to be introduced into the private sector. We find that confusing.

That concern is highlighted when we see no reference to ability to pay in subsection 40a(15). We have already told you that unless it is made perfectly clear, arbitrators will ignore it. Unless it says ability to pay is the paramount consideration, as it does in British Columbia statutes, we suggest that, with the best of faith, arbitrators will ignore ability to pay.

Also, it is disturbing when we see that clause 40a(15)(b) makes the standard to impose on an employer that which exists "for employees performing the same or similar functions in the same or similar circumstances as the employees in the bargaining unit." Those are extremely powerful words.

We respectfully submit that a small family business which is just breaking even should not be forced to pay the rates of a large, highly profitable conglomerate just because the employees are performing the same or similar work. However, clause (b) requires the opposite.

You can be certain the unions will appear at the arbitration table and say: "Mr. Chairman, the Legislature has directed you to look at what 'employees performing the same or similar functions in the same or similar circumstances' are earning. It did not say, 'Look at ability to pay.'" It said, "Look at this." That will result in increased costs to that employer which may well not be affordable.

Nor it is obvious to us that an employer in a community where prices are 75 per cent of those in another community in which a competitor is running should have to pay the costs in that higher-price community. Surely, if an employer is in Bracebridge, where the price of housing is three quarters of that in Toronto, there is an argument that the wages paid for the same or similar functions in the same or similar circumstances should not be the guiding principle.

The trend in arbitral jurisprudence to ignore what goes on in the private sector in making awards makes this even more disturbing. If one reads the arbitral awards, one will see all kinds of statements such as, "It is our

goal to introduce those terms and conditions of settlement that exist in the private sector." We then see the introduction of awards or settlements that are 20 to 30 per cent higher than those which exist in the private sector.

If we now introduce this legislation with this criterion in clause (b), arbitrators will be guided not by what is going on in the private sector, which should have been their guiding light initially, but by what arbitrators have done elsewhere. We get to what Mr. Weiler said in his hospital award, that it is a very incestuous system, in which arbitrators' awards breed further arbitrators' awards and the circle is never broken.

In our letter to the Treasurer in October, we wrote that the establishment of just and equitable terms and conditions of employment requires that both employees and employers be treated in a balanced way. At that time, we wrote that, in the light of the profusion of arbitral awards providing for 20 per cent and 30 per cent and more over two years, against what was then a backdrop of private sector settlements of four per cent and less, inflation of four per cent and less and unemployment of eight per cent, it was patently clear to us that the system was not working.

We understand it is the role of government to allocate the limited resources among the competing social purposes. That is not what is happening with the arbitral system. What we have described to this committee this morning and in our letter to the Treasurer are not anomalous, outlying examples of arbitral jurisprudence; they are the rule.

On the opening days of these hearings, staff of the Ministry of Labour described the process to review judicially labour relations board or arbitrators' decisions. That forum is by way of judicial review to the Divisional Court, and the mandate of that court is very limited. The result is that arbitrators have the right to be wrong. A court will say, "We would not have come to that conclusion, but unless it is patently unreasonable, we are not of the mind to upset that award."

We feel the introduction of a system such as the one proposed in Bill 65, against a backdrop of a judicial system that is not prepared to upset that kind of thinking, and the introduction of a system that functions with little guidance and vague direction, would produce a system that operates without sufficient check or balance.

10:40 a.m.

We would like to make a few additional points with respect to the legislation. We understand in subsection 40a(10) the parties have 21 days to be heard and 45 days for the arbitrator of the board to make his decision. We are all sensitive to counsel's problems of finding time. That is a fact of life. That happens with other tribunals, but that alone is not the bottom problem of that. The amount of research that goes into preparing for one of these cases is quite extensive and voluminous, and if we are talking about ability to pay, for example, that gets us into auditor reports. We think those time limits are unreasonable for the parties, and we are concerned that it may lead to the situation where the best arbitrators will not come forward because they will not be prepared or able to meet within that time period.

We also have trouble understanding subsection 40a(13) of the proposed legislation which deals with a freeze. Under the current rules for collective bargaining, once the party gets notice to bargain or once the party gets notice of the application for certification, terms and conditions are frozen.

The idea is that the employer cannot willy-nilly change things to change the world. Everything is frozen until we get that agreement in place or until the open period is over; that is, until the parties have the right to strike.

Once they are in the right to strike, the Legislature says: "Of course, you can change your terms and conditions. You can introduce that wage increase that you want to introduce or you can change that job description or whatever." Subsection 40a(13) of this would roll that back.

With legislation the way it works now, the parties get notice to bargain. They bargain. Both parties go through this process in good faith. The employer does not fool around with his terms and conditions of employment. Unfortunately, the employer and the union have different ideas about what that collective agreement should look like; they reach an impasse. The parties are in a legal position to strike or lockout. They strike.

At that point, the employer makes a change, as the employer is allowed to do. The union then goes to the board and says, "We want a direction to have access to arbitration." Subsection 13 says you have to roll back the terms and conditions to where they were in the notice period. That may involve taking money away from the employees. We do not understand the logic of that subsection.

Finally, we simply respectfully submit to you that it is not in the interest of the employers, the employees, the unions or the public at large to introduce legislation that is so vague and lacking in guidance that the parties do not know what it means and that moreover fails to give the guidance to provide, at the minimum, for ability to pay as a criterion for decision-making, all of which is respectfully submitted by us to you.

Ms. E. J. Smith: We often hear of the vagueness of the wording and so on of that which is supposed to reduce it to less than bad faith. That is the intention of subsection 40a(1). You make the point that you would prefer bad-faith bargaining--this is the one I have been trying to get in my own mind to all these questions--and one of the chief reasons you give is that jurisprudence exists. In any new bill, jurisprudence does not exist and the only way you establish jurisprudence is by the cases that come. I have trouble with that argument.

I assume we are looking here for a history of cases which creates jurisprudence that is something less than bad-faith bargaining. That is my first question. I do not know how you get jurisprudence on something that is less than bad-faith bargaining except by having the cases establish it.

Mr. Binning: Why do you want less than bad-faith bargaining?

Ms. E. J. Smith: Because that is the intention of the bill; that is the intention of subsection 40a(1); it is to go a little beyond bad-faith bargaining because it is a first contract.

Mr. Binning: Why?

Ms. E. J. Smith: I am not arguing that point. That is the intention of the ministry and the wording. You said to me that you think it should be only bad-faith bargaining. I accepted that; I have that noted. Then you went on to the business about jurisprudence. That is what I am addressing in my question.

Mr. Binning: We are also saying that clause 40a(2)(d), for example, goes far beyond even something less than bad-faith bargaining.

Ms. E. J. Smith: Clause (d) is a different point, and we have gone into it several times. We have been advised that jurisprudence provides that clause 40a(2)(d) is a catch-all phrase as taken by lawyers to apply to clauses (a), (b), (c) and the like.

Mr. Binning: You can say that. Why do you not--

Ms. E. J. Smith: I feel I am getting everything else except an answer to the question I asked, if you do not mind my getting back to my question.

Mr. Binning: There is jurisprudence on clause (b), for example--

Ms. E. J. Smith: That is bad-faith bargaining--no; clause (b) is new. Clauses (a) and (c) are bad-faith bargaining, and there is jurisprudence on them.

Mr. Binning: All right. The first major bad-faith bargaining case was Radio Shack. Clause (b) was an item that the Ontario Labour Relations Board held was an ingredient of bad-faith bargaining because of the uncompromising position.

Ms. E. J. Smith: Are you saying that clause (b) is also bad-faith bargaining?

Mr. Binning: The board found so in the first major case, which was the Radio Shack case.

Ms. E. J. Smith: If you are suggesting that clauses (a), (b) and (c) are all bad-faith bargaining, then that is what we have in front of us.

Mr. Binning: What are you going to do with clause 40a(2)(d)?

Ms. E. J. Smith: I told you I did not want to deal with clause (d) now.

Mr. Binning: I do not know if anybody has discussed the first Radio Shack case, but one of the major reasons for the decision of the labour board was the uncompromising position of the company on compulsory checkoff. That was one of the major bases for the board's finding.

Ms. E. J. Smith: Forgetting that for a minute, do you as a twosome consider that clause (b) describes further bad-faith bargaining?

Mr. Binning: Yes, the board has found that.

Ms. E. J. Smith: As far as the two of you are concerned, clauses (a), (b) and (c) are all bad-faith bargaining.

Mr. Binning: There is certainly an element of bad-faith bargaining in clause (b) that the board looks at.

Ms. E. J. Smith: Most of the things we are hearing here are that we should be going back to bad-faith bargaining. You are the first people who have suggested that clauses (a), (b) and (c) are all bad-faith bargaining.

Mr. Taylor: I do not think so. I think Mr. Shell would have agreed with that as well. He invited us to recognize that as bad-faith bargaining and then he added to it; he proposed his own amendment.

Ms. E. J. Smith: I am lost now as to what they are saying.

Mr. Binning: Clause (b) might be broader.

Ms. E. J. Smith: That is what I am trying to get at.

Mr. Binning: I am not saying it is exclusive. Clause (b), standing on its own--

Ms. E. J. Smith: May include some.

Mr. Binning: Standing on its own, it is an element of bad-faith bargaining.

Ms. E. J. Smith: Assuming that something in clause (b) is beyond bad-faith bargaining, which up until this point has been my understanding, then now else do you get jurisprudence on which to judge what we are doing? The intention of the minister, without question, was that this clause go a bit beyond bad-faith bargaining. I am assuming that clause (b) goes beyond bad-faith bargaining from the point of view of my question to you.

Mr. Wilson: I think the answer we got from the Minister of Labour and the Deputy Minister of Labour speaks directly to that. They were asked by Mr. McGuigan if the employer comes and says, "I am going to go under; I am going to lay off all my people"--

Ms. E. J. Smith: That gets to section 15.

Mr. Wilson: With respect, that gets to subsection 2; that is the access question. Mr. McGuigan said, "What happens in that case?" The Minister of Labour said, "Nobody sitting around this room can answer that." Well, in bad-faith bargaining, I can tell you the answer. It is not bad-faith bargaining if the employer comes and says, in a fair and rational way, "We are going to go under." That is not bad-faith bargaining.

Ms. E. J. Smith: I have heard you, and others who have come, on the fact that the ability to pay should be very much included and I accept that. A good deal of what you said related not to this bill, but to the process of arbitration. I think all of us, both in the committee and in our private meanderings around our private lives, hear this same accusation that the arbitration process in itself has very serious problems. In your presentation you demonstrated to me that even in Bill 111, where it states they will take into account ability to pay and they do not, that problem can be resolved only by looking at the arbitration process rather than the bill.

Mr. Wilson: With respect, I think there were some problems with the drafting of Bill 111. I have to tell this committee that I was involved in the drafting of that legislation, so I am not exactly throwing bricks at other people. There is a difference between that legislation and other legislation. Other legislation with respect to ability to pay may face a paramount consideration. Bill 111 did not, so arbitrators were able to walk away from that. I think it is possible to work up guidelines and criteria to give arbitrators greater guidance and to introduce greater responsibility and accountability into that system.

Ms. E. J. Smith: I think it would be very useful, and I have said this many times to groups in neighbourhoods and city council, if you could show us what you think we could do to incorporate some of these improvements. I think you have to some extent, and I give Mr. Snell credit for that. At least he gave us an alternative to look at, whereas your position against anything but bad-faith bargaining--

Mr. Taylor: Mr. Snell subsequently came back with a suggested amendment because his concern was precisely the concern of these gentlemen in terms of clauses (a), (b) and (c), that it was tantamount to bad-faith bargaining. He wanted to extend that and he subsequently came in with an amendment. Maybe these gentlemen can do the same.

10:50 a.m.

Ms. E. J. Smith: That is what I am getting at. It is useful not to assume the bill is going to go away, because it is not going to go away, but to look at it in the light of how it can be improved.

Mr. Binning: We recommend that clause (d) be deleted. There is no doubt in our minds about that because there is no restriction in clause (d).

Ms. E. J. Smith: We will have to get legal advice on that.

Interjection: They are lawyers.

Ms. E. J. Smith: I realize they are lawyers. He is a lawyer, too, and we have had his advice and Bob Callahan's. It is very much a legal point. I am not a lawyer. We have had lawyers say both.

Mr. Binning: Clause (b) is broader than the Ontario Labour Relations Board's jurisdiction. The board has dealt with items in (b), as I mentioned, in the Radio Shack case, but the board has refused to look at the bargaining positions of the parties to determine whether the bargaining positions are reasonable. They have said that especially about economic matters. The board does not want to look at economic positions. They did not find that compulsory checkoff in the Radio Shack case economic. They did look at the reasonableness of the position of the company and, as you know, they said it was not reasonable. Furthermore, you passed the Radio Shack amendment, as I call it, saying that compulsory deduction now is required if the union asks for it. That resulted from the Radio Shack decision.

It is broader and I think you will achieve your purpose if you leave clauses (a), (b) and (c) as they are and delete clause (d). You then will have achieved the purpose you have expressed; namely, that it is beyond bargaining in bad faith.

Mr. D. R. Cooke: That is not what you said a moment ago.

Mr. Chairman: Mr. Binning, that would be true only if clause (a), (b) or (c) went beyond bad-faith bargaining; (a), (b) and (c) are all bad-faith bargaining.

Mr. Binning: No, clause (d) goes beyond.

Mr. Chairman: The members of the committee are confused. Is (d) bad-faith bargaining or is it not bad-faith bargaining? That is what is in our minds.

Mr. Taylor: It is an element of bad-faith bargaining.

Mr. Binning: It has been held to be bad-faith bargaining and I gave you the example, but the board has said that if you are talking about an economic position, it will not determine under bad faith whether your position is reasonable. Clause (b) now gives the board further authority to determine whether the economic positions of the parties are reasonable. Are you with me?

Mr. Chairman: Okay, Ms. Smith?

Mr. Binning: Does that clarify that?

Ms. E. J. Smith: Yes.

Mr. Taylor: On that clarification, are you saying that (a), (b) and (c) are broader than bad-faith bargaining because you can take a single element of bad-faith bargaining and it can be sufficient justification, without full bad-faith bargaining, to access arbitration? Is that correct?

Mr. Wilson: That is correct.

Mr. Binning: It is not true to say that the board has not looked at an uncompromising position; the board has looked at it. However, you are inviting the board to look at an uncompromising position on all issues, including economic, and it has not done so until now. In that sense you have gone beyond, if I make that point clear. I am sorry if I was confusing the members, but it should end with clause (c). That is what we are saying. You have achieved your purpose.

Ms. E. J. Smith: I think we have to decide what clause (d) means. We get different legal opinions and I am not a lawyer.

Mr. Wilson: The problem is that this committee may decide it means one thing, but the board is going to decide it means something else. That lack of direction is the concern that we have, that I suspect the unions have and that any party should have before it goes before a judicial tribunal, because it does not know what the rules are.

Ms. E. J. Smith: I hear what you are saying. I also heard you say that even when it was spelled out it made no difference, but that is another problem. That is the arbitration process rather than the bill.

Mr. Wilson: That is right.

Mr. Binning: The important thing is that when you sit down to negotiate a first agreement, you should know what your bounds are. If you throw in clause (d), you do not know what you are dealing with, to be quite honest. With clause (b), it means basically that if you take a position in bargaining, you have to justify it. That makes sense. I do not argue with that. We do it all the time. You have to explain your position and it has to be reasonable; there is nothing wrong with that. If you go on beyond that, and I have made submissions before in this very room in regard to the appointments to the labour board, you can end up with any result depending on which panel you get down there.

Ms. E. J. Smith: That is the process again. I am not saying we should not look at the process. I am just saying--

Mr. Binning: It is the process, but to give them unlimited jurisdiction, as you have done in clause (d), is ridiculous.

Mr. Chairman: Are you saying if subsection 2 stopped at the end of clause (c), you would be satisfied?

Mr. Binning: Yes. Mr. Wilson might disagree with me on that but I can surely live with it.

Mr. Gillies: To speak to the same subsection 40a(2), looking at page 3 of your brief, we have a very clear disagreement between your interpretation of clause (d) and the interpretation of clause (d) as put to us by the ministry. The ministry representative has told us, and apparently Mr. Shell agreed, that through some legal principle I do not recall the name of, nor do I understand it not being a lawyer, clause (d) can only follow on clauses (a), (b), (c).

Mr. Wilson: Mr. Shell said that.

Mr. Gillies: Yes.

Mr. Taylor: Ejusdem generis I think.

Mr. Binning: That is a wrong application of that principle.

Mr. Gillies: I say to our representative from the ministry, I do not want to misinterpret what you told us but I understand that you said the principle in the legislation would be that clause (d) can only arise out of clauses (a), (b), and (c).

Mr. Failes: We seem to be using the ejusdem generis rule. I am sure counsel is familiar with that. I would be interested in hearing why they might think that rule would not apply to this piece of legislation.

Mr. Binning: You would have to add another word, so it read "any other similar reason." You would have to add something further. Any other reason means any other reason. For that principle to apply, you would have to add to clause (d).

We are saying, one, this is fairly significant legislation and you should restrict the jurisdiction of the board and, two, you should identify it so the parties know what they are doing when they are bargaining. You are going to interfere with bargaining. We are supposed to be in an economy of free collective bargaining. If you are going to interfere with it, please be definite so the parties know where they are at when they start to bargain.

Mr. Gillies: Okay. Could you repeat the name of that term?

Mr. Failes: Ejusdem generis. They think that adding the word "similar" would do the trick. That is something the committee might consider. It is certainly the intention.

Mr. Binning: We are opposed to clause (d) in any form because it is too general in nature. Even if you put the word "similar" in there, we would be very unhappy. Keep in mind that the more you put in here, the more money we make. You appreciate that, although we are not coming here from an economic point of view.

Mr. Chairman: You put the members of the committee in an impossible situation.

Mr. Binning: We know that pro or con the lawyers are loving this.

Mr. Mackenzie: We could bar the use of lawyers before the board.

Mr. Taylor: There are still lawyers with a conscience.

Mr. Gillies: Name one.

Mr. Taylor: I resent that.

Mr. Gillies: Jim Taylor to the contrary.

Mr. D. R. Cooke: I do too.

Mr. Chairman: Mr. Gillies, are you going to continue?

Mr. Gillies: Believe it or not, I still had a couple of questions. I am surrounded by lawyers, but I am going to have to look for legal advice on that one.

I wanted to ask you about subsection 15. You feel there should be an ability-to-pay clause in there, I guess clause (d). I am looking now at page 12 of your brief. I find your comments on clause (b) rather interesting. I can see a disturbing circumstance where a company in my riding, which is Brantford, would have lower costs, lower prices and lower wages than a similar company in Toronto, all for very good reasons. All those are part of the economic incentive to locate in a place such as Brantford as opposed to Toronto. If I buy your interpretation of clause (d), that company could be told by the arbitrator to pay exactly the same wage rate as a similar company in Toronto. Is that what we see in there?

11 a.m.

Mr. Wilson: That is exactly what is in there.

Mr. Pierce: Or more.

Mr. Gillies: Do you think the inclusion of an ability-to-pay clause would cover that or would you suggest either an amendment or a deletion of clause (b)?

Mr. Wilson: I am not happy with clause (b) but the fact is that arbitrators have a tough job. They are bombarded with statistics on cost of living, productivity, output per worker, ability to pay, you name it. In the end, they look at comparability because it is the easiest and most neutral thing for them to do. They can say that is what someone else is doing.

I suggest that clause needs a complete rewrite. There is no reference in there to total compensation as a criterion of importance. There is nothing in there about cost of living. Is cost of living a basis you have to get, or can it be a reason not to get it? There is nothing in there about productivity. One could easily describe a situation where the employees were very unproductive because they had bad management and when they got new management they became more productive, so they were competitive with someone else. Does that mean they automatically must share that?

The whole clause is as faulty as faulty can be. There is no doubt in my mind that the absence of an ability-to-pay clause will lead to arbitrators not giving it full value. I see it over and over again.

Mr. Binning: Would you accept such a recommended amendment?

Mr. Gillies: I would appreciate it very much. This one really bothers me because there are all kinds of smaller centres, such as the one in which I live, which use all kinds of incentives to try to get industry to locate there. One of the major incentives is that it is cheaper. If that is going to be fundamentally altered by this legislation, we should take a look at it. It costs only about two thirds as much to live in Brantford as it does in Toronto, and I have some concern about the implications of clause (b).

Mr. Chairman: The committee will be looking at individual clauses at the end of next week, so we will appreciate if you could send us something before then.

Mr. Binning: Mr. Chairman, I have one question. When do you think you will pass it, so we can add to our office staff?

Mr. Chairman: That will depend on whether the amendments say that lawyers cannot appear before the OLRB. Thank you very much for appearing before the committee.

The next group to appear before us is the Canadian Manufacturers' Association. Because of the change in time they are not here yet, so the committee will adjourn until 11:30 a.m.

The committee recessed at 11:03 a.m.

11:49 a.m.

Mr. Chairman: The committee will come to order. We have with us the Canadian Manufacturers' Association--Ontario division. Gentlemen, we appreciate the fact that you were able to come a few minutes early to accommodate our schedule since we had a late cancellation at 11 a.m. We are also pleased that you are here.

The Canadian Manufacturers' Association is a substantial organization, and we are pleased to look forward to having your views. Will you please introduce your delegation?

CANADIAN MANUFACTURERS' ASSOCIATION--ONTARIO DIVISION

Mr. Thompson: Perhaps the first thing I should do is introduce the group we have here. My name is Tommy Thompson. I am the chairman of the Ontario division of the Canadian Manufacturers' Association.

Sneldon Caplan is the vice-president and corporate counsel of one of our members, Prefab Cusnioning Ltd. He is a member of the Ontario bar. His company is a good example of the small-sized or medium-sized companies that constitute 75 per cent of the membership of CMA.

Allan Shantz is a director of contract administration for General Motors of Canada Ltd. He is also a member of our industrial relations committee, Ontario division.

Doug Smith is the vice-president of human resources of Inglis Ltd. He is also a member of the committee.

The Ontario division of the Canadian Manufacturers' Association welcomes this opportunity to comment on Bill 65, the government's proposed amendment to the Ontario Labour Relations Act on first collective agreement arbitration.

If we may, I will go quickly through the introductory parts of our brief, and then each of our presenters here will pick up various parts of the presentation.

The CMA has previously expressed its strong opposition to such legislation to the Ontario government and we are disappointed with its decision to proceed. The association believes that allowing the parties themselves to negotiate the terms and conditions of employment, or to engage in strike or lockout action as part of the negotiation process, is an integral and accepted part of free collective bargaining. Government involvement in this dynamic process should be kept to the minimum necessary to assist the parties themselves to reach an agreement.

The employer and the union are much closer to the specifics of the situation than arbitrators, and a negotiated agreement will better reflect their respective interests than one imposed by a third party. It is the parties who must live with the results of any decision; therefore, control over that decision should remain with them.

Furthermore, the certification process in this province does not usually involve a secret ballot election. In reality, formal certification of a union represents a legal imprimatur on the union's bargaining ability. What the trade union is able to do following its certification largely depends on the real support that it is able to muster in the bargaining unit, especially when negotiations get difficult.

The assumption of our system is that when the parties do reach an impasse, a test of economic will takes place to break the deadlock. Employees have the right to withhold their labour in support of their demands or in response to employer proposals. Employers, on the other hand, can accede to union demands or press for their own positions in the proposed agreement. The parties themselves bear the risks and responsibilities of their own choices. Providing for the imposition of a first contract fundamentally erodes this balance by virtually guaranteeing a resolution to the union.

Imposition of a first agreement also does not seem to work to the benefit of the new bargaining relationship, as demonstrated by the fact that in British Columbia, where first-contract arbitration legislation has existed since 1974, very few second agreements have been negotiated where the first agreement was imposed by the Labour Relations Board of British Columbia.

The CMA believes the imposition of a first agreement is an attempt to treat a symptom of a problem rather than the problem itself. The perceived problem is the refusal of an employer to recognize the bargaining authority of the trade union. The underlying problem, however, rests with the certification process itself, whereby certification is automatic if more than 55 per cent of the total number of persons in the bargaining unit have joined the union.

The automatic and often minimal nature of the certification process can result in the certification of a union which does not enjoy the true support of the people in that bargaining unit. Similarly, employers are often left

with the impression that the true wishes of the employees have not been represented by the process and that the union does not have the support of the employees. Both these factors contribute greatly to difficulties in negotiating a collective agreement.

The Canadian Manufacturers' Association believes bargaining rights should be granted to a union only if it obtains majority support of the employees in the proposed unit through a government-supervised secret ballot. This is a position which the CMA has held publicly for many years, and I think this becomes imperative in the face of the proposed first-contract legislation.

Speaking to the economic impact of this legislation, the impact of first-contract arbitration legislation would, of course, go far beyond the area of labour relations. The legislation may result, both directly and indirectly, in higher compensation packages for employees than would otherwise be attained through collective bargaining. This would impede efforts by Ontario industry to maintain and improve its competitiveness and thus would be an important consideration in future business decisions.

This legislation would have a very strong disincentive effect for potential new or ongoing investors. Ontario industry must operate in the North American context. It would be one more restriction, and a significant one, in an environment that is already perceived as being very highly regulated relative to its main competitor jurisdictions in Canada and the United States. Ontario must compete for both markets and investment dollars, and there is no doubt that first-contract arbitration legislation could have a profound impact on Ontario's investment climate.

Mr. Shantz, would you like to continue with the duty of the board?

Mr. Shantz: Yes. Before going on with the text, I would like to comment on one thing Mr. Thompson has been covering. General Motors is an employer that deals in both the United States and Canada. In effect, in Ontario we are competing with our sister jurisdictions in the rest of North America, many of which are in the US, for facilities and investment in our company. All our facilities in the US have the experience that there is always a vote to determine whether a bargaining unit will be established. This is a disadvantage we currently have here in vying within our corporation for investment funds for Ontario.

Mr. Mackenzie: It is also that a hell of a lot fewer workers have an organization even to represent them, percentage-wise or any way you want to measure it--relative, of course, to the size of our two countries--in the US.

Mr. Chairman: I think you will agree the whole question of automatic certification versus a vote is beyond the mandate in this bill.

Mr. Thompson: I would like to speak to that. I think the point we are making is that, by this bill, we are changing the balance of the whole negotiating process. We lose sight of the fact that most manufacturers feel very strongly that we want to have the bargaining unit representative of our employees. I certainly do. When we get this type of imposed contract, it becomes even more important that it become part of this whole process. It is very much a part of this presentation. If we are to go ahead with this type of imposed agreement, this is the only way we could redress the balance that may be getting unbalanced.

Mr. Chairman: Okay.

12 noon

Mr. Shantz: I would like to comment on Bill 65. I am going to start on the duty of the board, which is subsection 40a(2). You will note that subsection 40a(2) has four tests for when it may be appropriate, according to the legislation, for arbitration to occur.

The legislative model which would be least detrimental to collective bargaining systems and the economic climate is one triggered by a finding of bad-faith bargaining. Such a threshold test would help protect the integrity of the negotiation process by allowing the rights and responsibilities inherent in the process to be retained by the parties themselves except in exceptional circumstances.

Moreover, the test of bad-faith bargaining has been developed by the Ontario Labour Relations Board over many years. In contrast, the tests proposed under subsection 40a(2) of the legislation are totally untried. For example, would it be uncompromising and unreasonable for an employer to refuse to go beyond the legislated union recognition clause? Lack of known benchmarks will encourage a large number of cases to be tried to test the parameters of the legislation. This uncertainty would be both unproductive and harmful.

The association therefore submits that clause 40a(2)(b) should be rephrased to require clearly that the board direct the settlement of a first collective agreement only where it has made a finding of bad-faith bargaining. This would take care of the situation envisaged under clause 40a(2)(a), where the employer refuses to recognize the bargaining unit authority of the trade union. Clauses 40a(2)(c) and (d) should be deleted entirely. The discretionary power contained in those provisions is so broad that it negates the premise of a threshold test.

The association believes that legislation allowing the board to direct the settlement of a first collective agreement should be permissive rather than mandatory. There may be circumstances in which the conduct of the applicant is such that imposing an agreement would be inappropriate and unfair. I am saying that either side of a collective bargaining relationship could be guilty of behaviour such that it would be inappropriate to impose a first agreement. The legislation should clearly allow the board to refuse to direct that a settlement be imposed in such situations.

In addition to the prepared text, I would like to go back to the question of the vote. The first test is clause 40a(2)(a), "the refusal of the employer to recognize the bargaining authority of the trade union," and the second test is clause 40a(2)(b), "the uncompromising nature." It is our submission that these matters could be effectively dealt with by a vote. This kind of legislation is intended for only a few employers. We all recognize that this legislation is not intended for the vast majority of employers. My own employer, both in the United States and in Canada, is one that recognizes unions and wants to be considered an employer that has no hesitation in trying to deal properly at all times with its unions.

I think there is some recognition that this legislation is aimed at those few situations where there have been unfortunate impasses. For those few unfortunate situations I would submit that, if there were a vote, you might find fewer employers who would not recognize the authority of the trade union. The change suggested in our opening remarks by Mr. Thompson would go a long way to eliminating the necessity of the test in clause 40a(2)(a) in particular. It really supports the whole contention that the real test that is

required is the bad-faith test. Of course, the test in clause 40a(2)(d), "any other reason the board considers relevant," is far too general and fraught with peril to the generally good labour relations climate that we have in this province.

Mr. G. D. Smith: I would like to address the matter of the choice of arbitrator; I believe that is in subsections 40a(3) and (9). We would like to suggest that, in addition to providing for collective agreement settlement by a board of arbitrators or by the Ontario Labour Relations Board, the legislation should allow the parties the option of choosing a sole arbitrator.

From my own personal experience, having sat as a sidesman on a number of arbitration cases, trying to get three fairly busy people's schedules together--and I am sure I am telling you nothing that you do not run into all the time--at least that option should be there. There is also the question of the cost of the sidesmen for some of the smaller manufacturers. However you people make up the rules, the costs of sidesmen could be almost prohibitive for a small employer.

Getting back to the time frames, we question whether the time frames set forth in the legislation are realistic. Just this month of March I received a notice from the Ontario Labour Relations Board, all of whose members, I am sure, are more than aware of this, that it has changed its procedures in unfair labour practice, sale of business, religious exemption, consent to prosecute and even under the Occupational Health and Safety Act. It is my view that this is an admission that they are not handling their work load in a timely fashion and are trying to do something about it. God bless them. To further sink them under the work load of this first-contract arbitration, I suggest, may be less than realistic.

There is another point. It must be noted that there is an urgent need to train board members. Arbitrators in Ontario have virtually no experience in dealing with private sector interest arbitration. We have some very good arbitrators in this province, but they are dealing primarily with rights arbitration. This is particularly important to the survival of the private sector, which has to deal with the reality of dollars and cents and make a profit--something that is not always necessary in the other sector of the economy, or so it appears.

Dealing with the mediator, subsection 40a(10), the Canadian Manufacturers' Association is very pleased with this provision, which allows the minister to appoint a mediator to confer with the parties. As we have stated previously, the objective of any initiative should be to provide the legislative framework which encourages and facilitates the parties themselves to reach an agreement. This provision is consistent with that objective.

Mr. Caplan: I would like to comment on the effect of direction on strike or lockout requirements to reinstate employees. The section as drafted in the bill has many strong points, but we have certain concerns about the way the bill has been drafted and presented.

With regard to the provisions for recalling workers out of seniority, the act has looked at the problem employers often have when they have to recommence operations. It is often not appropriate to call people back strictly related to seniority, because the operations are not there. If the employer and the trade union cannot agree on reinstatement, the onus is put on the board to make a direction on how the recall should be done. We feel that putting that onus on the board and not forcing the employer and the trade

union to come to an agreement of this sort can create serious problems with the startup of operations under this provision.

12:10 p.m.

The second area we are concerned about is the reference in subsection 40a(12) to permanent discontinuance. The experience I have had in startups of operations is that they can take anywhere from seven to 10 days. Second, there are certain operations that, because of the seasonal nature or the length of the strike, etc., may not be permanently discontinued but will become discontinued just because of the length of time the strike has gone on. I do not think the act has addressed this problem, and I do not think the act has looked at how the employer and the employee will deal with the situation.

Depending on job classifications as determined by the collective agreement and on individuals and their abilities, the act may impose certain individuals with certain seniority to be called back for jobs that are not necessarily those they were doing before the operation but that potentially will be there in future.

The act has looked at this and proposed certain solutions to it. Our feeling is that if the act is modified to take into account some of the practical concerns we have, it will clearly reflect this and lead to smoother operations if the act is passed.

Mr. Snantz: I would like to talk about subsection 40a(15). The legislation attempts to ensure that the arbitration board does not interfere with matters that may be agreed to by the parties. We are encouraged by this approach. Our basic thrust is that to the extent possible, collective bargaining processes should be left to the parties with minimum intervention from a third party. However, we feel we must go a little farther to strengthen this section if such legislation is felt to be necessary.

To emphasize the point that matters agreed to in writing by the parties shall be accepted without amendment, the Canadian Manufacturers' Association recommends that subsection 15 be limited to that point and read as follows, "In arbitrating the settlement of a first collective agreement under this section, matters agreed to by the parties, in writing, shall be accepted without amendment."

A subsequent subsection should then incorporate the matters to be accepted or considered by the board or arbitrators in making their settlement. It should be expressly stated that the board or arbitrators must consider only those matters or issues on which the parties themselves have made submissions. The final decision should respond directly to the representations of both parties, with the reasons for the decision set forth therein. That should be qualified to state that if such disclosure reveals specific competitive circumstances of the employer, it perhaps would not be prudent to get into the details of the reasoning behind the decision. The ultimate goal should be to reach a settlement that the parties themselves would have agreed to.

In determining the terms and conditions of employment, the legislation should provide that account should be taken of normal acceptable standards for first agreements within that type of industry. It is totally inappropriate to consider the terms and conditions contained in long-standing collective agreements, as clause 15(b) currently states, because such agreements are the accumulated result of a series of negotiations. The terms and conditions of contracts that have been built up over a long period of time should not

represent a new floor for first agreements. To do otherwise would negatively affect both the employer and the employees in the long term.

The legislation should provide that account be taken of the employer's competitive position within its own market in establishing the terms and conditions of first agreements.

Clauses 15(a), (b) and (c) as they currently read should be deleted. Clause 15(a) of Bill 65 states that account may be taken of "whether the parties have made reasonable efforts to reach a collective agreement." Consideration of a party's conduct already has been taken into account when the board decided to direct that a settlement be imposed under the tests in subsection 2. It is inappropriate that a punitive approach be pursued in establishing the terms and conditions of employment that will form the basis of the employment relationship for some period of time.

Clause 40a(15)(c) is simply too vague, allowing the third party to consider such matters as it "considers relevant to a fair and reasonable settlement." As a possible alternative, reference could be made in the clause to "such other matters as have been brought forward by the parties themselves," again dealing with the matters that the parties themselves have in contention.

Interjection: Does the bill speak to the effect of the settlement?

Mr. Shantz: Yes, the effect of the settlement is in subsection 40a(16). We feel that the term of two years for an imposed settlement is excessive. It is imperative that the parties begin a normal collective bargaining relationship as soon as possible. I hesitate, Mr. Chairman, but management's view of the certification process being as suspicious as it is, it is often viewed as two more years of enforced coexistence, which, instead of helping the relationship, is more liable to hinder it.

Furthermore, the association believes that the first-contract legislation goes a long way to shifting the fundamental balance of power in the current collective bargaining system by removing the risk of one of the parties. A promise of a two-year guaranteed settlement with minimal risk of a work stoppage aggravates this imbalance further. In keeping with the legislation in three of the four jurisdictions that have first-contract legislation, we feel the imposed settlement should be for a term of one year only.

It is my understanding that an amendment has been proposed regarding retroactivity. Contrary to that amendment, we feel the retroactivity of the settlement should be limited to the point at which either party applies to the board to direct the settlement.

Mr. Caplan: As to the application, in subsection 40a(19), the Canadian Manufacturers' Association has a concern about the application to the situation in which the bargaining units have been acquired since January 1, 1984. Legislation affecting substantive rights should not be given retroactive effect. Furthermore, many significant changes will undoubtedly have taken place since January 1, 1984. For example, employees may no longer wish to be represented by that union, or the employee base or the work base may have changed significantly. There are a number of factors. We are talking about a two-year period.

There is also a significant practical problem of overwhelming the Ontario Labour Relations Board with applications for an imposed agreement from

previously dominant bargaining agents. Given present conditions, the board clearly will be unable to handle the influx of expected applications, especially in the light of the legislation's tight time frames. Similarly, the lack of arbitrators with the experience in private sector interest arbitration will present significant difficulties for current active relationships without compounding the problems through extending the application of the legislation in this manner.

Finally, the association is concerned that, as currently worded, the legislation could be held to apply in a situation where one union has simply replaced another. The legislation must clearly specify that it applies only to the situation where it is the first agreement ever on behalf of that bargaining unit. I do not believe the intent of the legislation was to permit these provisions to be used in the case of a new bargaining unit being certified to replace an old bargaining unit, but I would personally enjoy arguing in front of the board the way the current legislation is worded.

Mr. Thompson: In conclusion, the current labour relations system, despite its acknowledged imperfections, represents a workable balance between employers and unionized employees. It allows proper recognition of the needs of employees and of the economic realities faced by companies. We feel that Bill 65 as currently written would fundamentally erode this balance by virtually eliminating the risk and responsibility of one party. Therefore, we feel it is unacceptable in its present form.

12:20 p.m.

Mr. Chairman: Thank you, Mr. Thompson. A number of members of the committee have indicated an interest in engaging you in conversation.

Mr. D. R. Cooke: Before I start, could I have a clarification, since I was not on the committee when we first started to consider this? In so far as the ministry is concerned, what is its view on the last point that was raised by Mr. Caplan?

Mr. Chairman: Mr. Failes is the policy analyst with the Ministry of Labour. He has been helping us here.

Mr. D. R. Cooke: That is the issue of one union replacing another.

Mr. Failes: It would be a new relationship in that case. The new union would be entitled to apply for first-contract arbitration. I will look into that further, but I believe that is what is anticipated. The apparent wording is the intention.

Mr. D. R. Cooke: That is what the Canadian Manufacturers' Association is disagreeing with.

Mr. Gillies: A bargaining unit and an employer could go through this entire process. Then there could be a decertification and certification of a new bargaining unit. Let us say a year later, could it have to go through the whole thing again?

Mr. Failes: It is a different set of negotiations with an entirely different bargaining agent. It seems to me it is undesirable to have the next bargaining agent, who had no part in the prior negotiations, bound by whatever happened in that first set.

Mr. D. R. Cooke: Would that be so even if the first agents entered into a contract which was completed and then they were decertified?

Mr. Failes: Then you are in a different situation. There might have been a collective bargaining relationship in a plant 10 years ago. That agent was decertified. Ten years have gone by and now there is a new bargaining agent. If you take the position that this bargaining agent is now precluded from applying for first-contract arbitration, it seems a little unreasonable.

Mr. Thompson: That seems to go a long piece away from the intent of the legislation. You could have an agreement that may have been in place for 10 or 15 years with a certified unit. Then, through the normal period of opening a change in certification, you could go through this whole process again. The intent of this legislation is to prevent the hangups we appear to have gotten into in a few cases of getting a union certified in a plant. To introduce it into the change of certification seems to be a whole new direction. It is not the intent of the bill, as I understand it.

Mr. Failes: I think the intent of the bill is to avoid those bitter first-contract strikes where you have two parties who have not built up a relationship. In that case, you would have two new parties. The new union has never had a relationship with this employer. As a result, bargaining may become frustrated, perhaps not out of a desire to avoid unions in general but simply out of an inability of these two parties to get along initially. We want to give them a chance to develop that relationship.

Mr. Caplan: The problem I see in opening it up to this potential of a second bargaining unit coming in is that the employer may be looking at a problem of internal politics within the union itself. I think the brewery workers are a prime example of internal politics which have led to a decertification and a new certification. Then you have this first-contract arbitration being imposed on the employer in that situation. That is one situation.

I wonder if labour has looked at the other situation thoroughly, where there are unions going out to convince employees or making an attempt to convince employees to decertify and recertify with the union because then it can get the employees the advantages of the first-contract arbitration. Unions can say: "You cannot lose anything. We will go into the arbitration and say, 'This is the contract they had, but we are in because they did not like it.' We will get you better. We have to get you better because we are going to go through arbitration."

I am a labour lawyer, but if I were on the employees' side, I would say: "Hey, this is terrific. If we are going to go out and bust other unions, this is a perfect way to do it." You can use first-contract arbitration as a big club against the employer and say, "Even though you have had a relationship for a number of years, we can start from scratch and if they do not agree to our unreasonable, or what we considerable reasonable, demands, there is first-contract arbitration."

Mr. Mackenzie: I would submit to you a much more likely scenario would be a unit that has entered into an agreement in co-operation or almost in collusion with management. I have had a couple of examples of those under decertification which were as a result of the membership waking up to what had actually happened.

Mr. Caplan: That is a possibility. I cannot argue with you. At the

same time, I think all the ramifications have to be examined in this concern.

Mr. Thompson: The point that you have an entirely new party entering negotiations is not entirely correct. Despite all the negotiations I have been through, maybe I am still an idealist, I consider that I am negotiating with my local union members and officers. In most cases much of that framework stays in place. You may have a change in certification with another union, but you are dealing with the same group of employees that you have dealt with for many years. It seems to me it is not a whole new ball game that you have in a first contract.

Mr. Failes: Perhaps someone can answer this question for me. I assume when a new union comes in and replaces an old union there is a substantial change--

Mr. Thompson: Not necessarily. It can be so but it does not always happen. I am trying to think of one where it did not.

Mr. D. R. Cooke: That is a very interesting point. I appreciate your bringing it up. The other question I have is quite different. It is to Mr. Shantz. On Monday, I was in Osnawa and listened to your president announce a \$2-billion investment program in this province. It was overwhelming and we were delighted with it. I note that the United Auto Workers expressed its delight and there were compliments to your company for its labour relations. I take it that this impending legislation has had no impact on the General Motors expansion program in this province?

Mr. Shantz: I work in the area of labour relations and one of my tasks is advocacy on behalf of Ontario expansion within our company and to try to paint a picture of our ability to deal with our employees in a way that enhances our ability to get investment in Ontario, indeed in Canada.

I have concerns about labour legislation such as this, along with other forms of labour legislation which put the Ontario jurisdiction beyond the majority of the competing areas in North American for the investment that a company such as ours can get into.

I might add that although this legislation seems to be targeted or to have resulted from a few instances that got a lot of visibility over the years, Radio Shack and Fleck for example, GM is very concerned that this kind of legislation could ultimately impact established relationships. In our case we have quite a number of unrepresented folks whose salary policies are determined in relationship with other nonrepresented employees throughout North America. This legislation would complicate the way in which our unrepresented employees have maintained their employer-employee relationship with us.

12:30 p.m.

Even the parameters which the arbitration board or the labour board would consider if these folks ever decided to become represented would be far different from the usual parameters that are considered in determining policies for nonrepresented employees. I just see it as a very bad fit, which is perhaps one of the reasons GM, a large employer with a proven track record with represented labour, as evidenced by the announced expansion, is concerned about this legislation. It has far-reaching potential impacts throughout Ontario beyond the target group.

Mr. D. R. Cooke: Including an impact on your own company?

Mr. Snantz: Yes.

Mr. Thompson: As the Ontario division of our association, part of our responsibility is to make sure we inform government of the cumulative effect of various pieces of legislation in the jurisdiction. The thing we have to watch constantly is that we do not get, for a relatively short-term political interest, an accumulation of things that change the balance in this matter to where the jurisdiction gets to be less attractive.

We are not talking about short-term things. I imagine the GM decision was made several years ago. This was not even talked about then. It is not yet legislation. We have hopes that this is a long-term proposition and we have to worry about the general environment we set forth for investment in this province.

Mr. Snantz: Mr. Thompson is correct. The GM decision announced on Monday of this week was started long before this legislation was contemplated or made public.

Mr. South: I am interested in Mr. Thompson's remark about British Columbia where there is such legislation. Where this legislation has been imposed, the number of instances of getting a second agreement is very low. Do you have any statistics in that regard?

Mr. Thompson: We have them; I do not know whether they are readily available but we will try to get them for you if you like.

Mr. South: Yes, it would be appreciated.

Mr. Thompson: We can send them to the committee.

Mr. South: It is important, as it is being brought out in this committee. On average, we are dealing with about 38 instances per year in which they can arrive at a satisfactory first agreement. Your statistics may indicate that legislation such as this may not do all that much good with regard to those 38 instances.

I am also intrigued by your remarks about the need for a vote. What do you believe happens? As the system now exists, the union has to get signed cards to indicate support. What differences do you feel happen by asking for a private vote?

Mr. Thompson: There are several things. The first one is a very oversimplified problem. We have all had experiences where there has been competition for certification. We know of employees who have signed two and three cards for various bargaining units. The type of group you are dealing with is subject to a lot of momentary coercion and pressures.

The only real way to get away from that pressure is a secret ballot. This argument has been going on for years. It always interests me that management is quite prepared to live with the democratic process. Apparently, the unions and some of their political allies are not. I thought the democratic process was the name of the game.

Mr. D. R. Cooke: Do you want equal time, Bob?

Interjections.

Mr. South: Since Mr. Mackenzie has organized in the past, I would be interested to know how he feels about a vote as opposed to the present method of getting cards signed.

Mr. Mackenzie: For starters, I am interested in knowing whether they will accept the application date as the terminal date if we even get around to discussing it. In every single plant I organized back in my Windsor days, my experience was that the pressure on the employees came after the application was posted. In every one of the 13 locals I organized, every petition came afterwards and was finally thrown out by Finkelman. Some of them proved it was the company lawyer or a couple of the foremen who prepared it. The pressure on the employees came during that time.

I had to bend over backwards to make sure I got the buck, that they signed the card and that there was no undue influence on them. There sure as hell was from the other side in every case in which I was involved. It taught me a lesson a long time ago. I do not accept the 55 per cent or more. When you have to get the card, you have to visit them. When you have trouble getting it, you usually have a fearful group of workers to begin with. I do not accept there is not as much commitment there as you would get in another case. If you are going to leave a time after the application for the pressure to start on the employees, that is when you are not likely to get a fair vote.

Mr. South: What are you saying? You would accept a vote--

Mr. Mackenzie: I would not support the vote but I might consider it if we change some of the procedures, including the fact that the minute the application is in there is a freeze on all actions and the vote is taken based on the cards submitted.

Mr. Thompson: It has always confused me. The unions should have every bit as much interest in a secret ballot as management because your complaint is always management influence. The secret ballot is--

Mr. Mackenzie: While they are waiting for that secret ballot, one hell of a lot of influence can be put on workers in a plant where they rely on that company for their employment.

Mr. G. D. Smith: I do not ask you to put too much weight on this. I go back more years than I care to count, but I had a number of summer jobs; this was in a jurisdiction other than Ontario. For a little more than three years, I earned my living as a journeyman millwright in a large pulp and paper industry after dropping out of engineering at university. This may not be representative when talking about influence, but my situation was: "Come on, Smith. You had better sign up or you will not have a job when we get in. Come on, Smith. It is going to cost you only \$1 now. It will cost you \$25 or \$30 later when we get in." That is one person's experience. All I say is il y a deux côtés à la médaille; there are two sides to every story.

Mr. Mackenzie: That kind of pressure was not proved in any of the 12 cases I took to the board on our side. In every single case we had, Finkelman threw out the company's counter petitions. I have not seen very many where there has been that kind of verification.

Mr. G. D. Smith: I make the statement only from personal experience.

Mr. Shantz: I would like to address this question. You might say that in the situations that got a lot of visibility and triggered this proposed legislation, there is an element running through those situations, as much as I have been able to read about them, where the employer was perhaps doubtful that the union necessarily represented, if you will, the silent majority of the people in the work force. A secret ballot vote convinces the employer that the union does represent those employees and speaks for them with full authority.

Mr. Gillies: I do not want to get dragged into the latter discussion. I have to come down partly on both sides. If some mechanism could be found to remove influence on anybody's part on the free choice of an employee, perhaps a secret ballot would be desirable. That is a discussion for another day.

I want to go to the point made about the question of a successor bargaining unit moving in and the negation of the contract. This bothers me. I am far from being an expert on labour law, but tell me if I am not correct that if under this legislation a settlement were imposed on a place of business, and within the period of that contract the ownership of the company changed, the new successor company would be bound by the contract.

Mr. Failes: That is correct.

Mr. Gillies: With this process going into place, I fail to see why within the period of time the contract is in effect a new bargaining agent would not be bound by it too. It would seem to be fair. I am especially worried about a small employer going through the process we put in place in this legislation, which could be reasonably complicated, expensive and lengthy, with all the attendant uncertainty of decertification and so on that accompanies a new relationship between a company and a bargaining agent. Good Lord, they could be back into it again on a second go-around within six months. Does the ministry contemplate that and not see a problem with that?

12:40 p.m.

Mr. Failes: Are you suggesting that at the end of the collective agreement--

Mr. Gillies: I am just thinking out loud and I have not floated this by anyone, but if the contract is binding on successor employers during the term of the contract, it would seem fair to me--I hope I am not being naïve about this--that the same contract would also be in effect for successor bargaining agents during the term of the contract.

Mr. Failes: It is.

Mr. Gillies: Okay. That is not what I understood to have been said earlier. So within the two years you cannot have another bargaining agent take over and say, "We want to go through this process and negotiate again."

Mr. Failes: If I understand your question correctly, my understanding is they would be bound by the collective agreement as well for the period of the collective agreement.

Mr. Thompson: It is only in the last two months of the collective agreement when there can be a change of certification, and that is the period in which some of them might well apply. But again, while you get a new

certified union, very often the existing contract is the basis for a continuing relationship. The contract does not get totally thrown out either. It seems to me to be a totally different situation.

Mr. Gillies: Okay. Your concern is not during the term of the contract but that an employer could have to go through this again.

Mr. Thompson: They cannot change it during the term.

Mr. Gillies: No, but somebody could have to go through this again after a period of two years when there is--

Mr. Thompson: No, one year if our recommendation is followed.

Mr. Gillies: All right.

Mr. Pierce: Even if the company changes ownership in that first two-year contract and the employees request a decertification and a new certification.

Mr. Gillies: What you are saying is that if suddenly there is a new owner of the company and a new bargaining agent within the term of the contract, the contract still holds.

Mr. Pierce: That is right.

Mr. Failes: As was explained, there is only a very limited open period at the end of the contract when you can try for decertification. In effect, what is going to happen is that, in the normal case, the new bargaining agent is not going to come in until the end of the contract. That is the normal case.

Mr. Gillies: Okay. Moving right along.

Mr. Thompson: There is provision in labour law in that the existing contract is to stay in place during any period of negotiation. It is not as though you are starting over without a contract.

Mr. Pierce: During the period of negotiations, but there is nothing wrong with applying for decertification part-way through a contract.

Mr. Thompson: You cannot do that. There is only a two-month period.

Mr. Gillies: All right. I better understand your concern now.

Second, I would like your comments on the prerequisites or the preconditions to this arbitration process. I think all of us on the committee, coming from one perspective or another, have concerns about the vagueness of subsection 40a(2). However, we have had a number of representations, particularly from labour groups, that are concerned that the prerequisite of finding bad-faith bargaining would be too stringent. They point as an example to the fact that bad-faith bargaining was not found in the Eaton's case, and this is a rather compelling argument. I wonder whether you could comment on that. What they are really saying is, "We will never get it."

Mr. Thompson: That is almost a classic case. You have noticed the change in certification in that case. Obviously, the very problem we were worrying about existed, that the union was not representative of the wishes of

the employees.

Mr. Gillies: I suppose that is possible, but if the intent of this legislation, in whatever form, is to try to help cement relationships between an employer and a new bargaining unit, we are searching for the best way to do that and we are having a number of representations saying that the kind of prerequisite you suggest would not help in that regard.

Mr. Caplan: If I may comment, looking at it from a management perspective, one of the feelings is that the successful collective agreement is the one that is negotiated between the parties and the one that has come through an agreement between the parties. The concern is that opening it up and broadening it into these other areas that are very ill-defined will result in the imposition of an agreement that will not solve the problems or will not answer the desires of the workers when they searched for or requested a bargaining unit.

The refusal of the employer to recognize the bargaining authority of the trade union, I think, would fall under the bargaining-in-bad-faith provisions, or it should fall under the bad faith provisions. When you get into "the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification," what is a definition of "reasonable justification" and "the uncompromising nature of any bargaining position?" My experience with the bargaining process in which I have been involved--and I am not as experienced as these gentlemen, but I have been involved in a number of them--is that what is uncompromising 15 days before the legal day to strike becomes very flexible in the 12th hour. It is all part of the process.

To broaden it, to take this out of the process and impose a settlement, especially when our research indicates that imposed settlements under similar legislation do not seem to survive after the first collective agreement, makes it very difficult to see what this will add to the bargaining powers among the parties.

In the Eaton's situation specifically, they did end up with a contract. Now there is an indication there is a movement to decertify. If they had ended up with a contract imposed, would it be the same situation as they had in Manitoba where Eaton's closed down the first floor of the store? Does an imposed settlement solve the problem? Are we using a club where we should be using a much more delicate manoeuvre? Are we fundamentally destroying the bargaining relationship between employer and employee?

The last nasty set of negotiations in which I was involved--if you want to use the term "hasty"--was the first set of negotiations in a plant in Toronto that had not been certified for more than 60 years. It was the first certification. We have a contract now. We are in the second year of the contract. We have had two grievances filed and it has been running extremely smoothly, but we had hard bargaining to reach that point.

Looking at that situation, if we had an imposed settlement by somebody who did not know that operation, where would we have been? That is what concerns me. Would the company have even survived? Because the terms and conditions of that imposed settlement would have been so different from what was actually worked out, would the employees feel they are being fairly represented? Nobody accused either side of bargaining in bad faith in that situation although we went before the Ontario Labour Relations Board for other reasons. Unfortunately, there were certain things that went on. Neither the employer nor the trade union was fined in that situation.

It is a dramatic overkill in this situation. What will it actually accomplish? What would have been accomplished in the Eaton's situation if there had been an imposed settlement rather than an agreement? Would we have the Manitoba situation where employees actually lost their jobs?

Mr. Gillies: I cannot answer that.

It would be helpful to the committee to know if the Canadian Manufacturers' Association can contemplate a threshold short of bad-faith bargaining that would be more satisfactory to you than what we have here.

Mr. Thompson: There are renegade employers and renegade unions that will always give us trouble from time to time. I do not think there is any perfect world. There is a lot of confusion about this so-called bad-faith bargaining. In many cases, what appears as bad faith on the part of the employer--and I can only speak for the employers--is a very real concern about whether the certified union is representing its employees. That is not bad faith. An employer has a responsibility for his employees. Much of what appears as bad faith is just a concern about whether the union really represents those people in the plant. As we have seen in British Columbia and locally, apparently that is not true.

12:50 p.m.

Mr. Shantz: I would like to add to this discussion. I was reading this morning about the Ontario Labour Relations Board's decision regarding the Royal Conservatory of Music and the University of Toronto. It had to do with the Royal Conservatory of Music asking for information on a number of points with respect to an upcoming separation of the conservatory from the University of Toronto. The information was being requested during the time of bargaining. It resulted in an Ontario Labour Relations Board award that further defined the question of what is good-faith bargaining and what is bad-faith bargaining. It helped to clarify it.

That is only one of many awards that have given direction to the parties in Ontario as to what is appropriate. In this case, according to the OLRB, it was appropriate to give information to the Royal Conservatory of Music so it could be informed and could bargain intelligently with access to this important information, whereas the University of Toronto had decided it should not give this information.

Why reinvent the wheel? Some of the benchmarks that have been laid down as definitions of what is appropriate conduct go to disclosure of information and other matters that help the parties to get together, and collective agreements emerge at the end of bargaining in the vast majority of cases. Our concern is that we will tamper with the vast majority of relationships where both parties accept responsibility and achieve successful collective bargaining relationships. This legislation might result in situations such as I am told exist in Quebec, where the unions in a very high percentage of cases apply for first-contract arbitration, thereby taking both parties off the hook of being responsible for bargaining.

As Sheldon pointed out, what may be perceived as hard bargaining often results in agreements that are accepted by both parties, lived up to and defended. If we degenerate into a situation where a high percentage of first-contract agreements are achieved through arbitration, our concern is that the strength of those relationships will not be as good as it is under our current system.

Mr. Gillies: Perhaps I can leave you with this thought. I will be very frank with you. Based on the discussion I have heard so far, I do not believe the committee is prepared to go to the bad-faith-bargaining test. The minister had that option before he brought in this bill. I believe, however, the committee is largely dissatisfied with subsection 40a(2). We will be dealing with it next week in clause-by-clause debate. If you have any concrete thoughts on how to redraft that subsection to improve it, I for one would very much like to see them.

I will ask one other question. On page 6 of your brief, you have touched on a concern I share about the time frames. No one I talked to in the ministry or at the Ontario Labour Relations Board thinks the time frames in the bill are ever going to be met. I want to try out on you the initial 30 days for preparing a case by the parties to go to the board. Do you think 45 days is more reasonable?

Mr. Shantz: Anything is an improvement.

Mr. Gillies: We do not want to lengthen this unduly. It is my sense that it is unrealistic and unreasonable for an employer not familiar with this area to retain counsel and prepare any sort of proper case to go to the board in 30 days. I am batting around moving an amendment for 45 days.

Mr. Caplan: In my experience of preparing cases for the board when I was in private practice, it is very difficult for an outside party such as a solicitor to step in and understand the operation in order to prepare it for the board and marshal the evidence appropriately. When you are presenting a case to the board for a collective agreement, where the operation has to be understood, 30 days is going to be impossible and 40 days is going to be difficult.

If you have a very sophisticated operation, such as my colleagues here have, you have the staff and the individuals there who can prepare the basic ground information. If GM were in that situation, it would not have to retain outside counsel. They could do it themselves. Before I arrived on the scene, if Prefab Cusnition were in this situation, there was no one to prepare it or who knew how to prepare it. Outside counsel had to lead them by the hand through this situation. It is a very expensive procedure, which is bad enough, but also outside counsel does not have the time. If you impose a 30-day time limit on outside counsel, it is extremely difficult.

I appreciate the idea of not extending this for ever. We have to get this to the board. Will the board have the time? Most board hearings in which I have been involved are now taking four months to resolve. You get two days scheduled and then you get another day six months down the line. It is very difficult. As you say, you have to look at the time limits very carefully. It will make a mockery of the act if they are just being ignored by mutual consent.

Mr. Gillies: That is my concern. Everybody I speak to connected with this says the same thing. I think we might do the minister a bit of a favour, because under subsection 40a(17) he has the power to vary. The feeling at the labour relations board is that he will have to make a ministerial order every time, so we may be able to save him some trouble too.

Mr. Chairman: Thank you very much for appearing before the committee, Mr. Caplan, Mr. Shantz, Mr. Smith, Mr. Thompson. We appreciate hearing your views.

The committee recessed at 12:56 p.m.

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STANDING COMMITTEE ON RESOURCES DEVELOPMENT
LABOUR RELATIONS AMENDMENT ACT
WEDNESDAY, MARCH 26, 1986
Afternoon Sitting



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Witnesses:

From the United Food and Commercial Workers International Union:

Evans, C., Canadian Director and International Vice-President

McCormick, C., Administrative Assistant to the Directors

From the Toronto Typographical Union, Local 91 and the International Typographical Union:

Grey, D. W., President, TTU, Local 91

Weatherdon, R. S., Representative, ITU

From the Ontario Secondary School Teachers' Federation:

Albert, R., President

Buchanan, M., Past President

Forster, J., Associate General Secretary

Baumann, R., Vice-President, Protective Services

Isnibashi, R., President, District 53, Haldimand County

From the Ministry of Labour:

Failes, M., Policy Analyst, Labour Policy and Programs

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Wednesday, March 26, 1986

The committee resumed at 2:10 p.m. in committee room 2.

LABOUR RELATIONS AMENDMENT ACT
(continued)

Consideration of Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: The resources development committee will come to order. Our first witness this afternoon is the United Food and Commercial Workers International Union, with Mr. Cliff Evans and Mr. Charles McCormick. Welcome to the committee. We are glad you are here. Please introduce yourselves.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

Mr. Evans: I am Cliff Evans, Canadian director of the United Food and Commercial Workers. Chuck McCormick is the administrative assistant out of our national office.

We have a couple of documents we would like to distribute if we knew the procedure.

Mr. Pierce: Throw them around.

Mr. Chairman: I can see already that the presentation you have given to us is of an unusual format. Go ahead any time you are ready, Mr. Evans.

Mr. Evans: I would like to start off by going to the Labour Relations Act. In the preamble, it says the purpose of the act and "public interest of the province of Ontario" is "to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees." This says that people who choose a trade union to represent them before the Ontario Labour Relations Board through the certification process are entitled to get into the collective bargaining process; indeed, to get a collective agreement.

The first page of our brief outlines for you some UFCW first-agreement strikes that have gone on in Ontario over the past few years. Let me give you, as an example, the case of a local union situated in Kitchener, Ontario, that covers basically central and western Ontario. It has about 120 collective agreements. Over the past eight years, excluding persons covered by the Hospital Labour Disputes Arbitration Act for hospitals and nursing homes, it has received 28 certifications. There were strikes for six of the units designated in the first grouping to attain a first-collective agreement. There were also 13 bargaining units for which no collective agreement was attained. You have four collective agreements that were arrived at through the collective bargaining process, 18 for which no collective agreements were reached and six strikes. Collective agreements were obtained in four of the six strike units.

In that same local union during that period of time we also received 10 nursing home certifications. All are under collective agreement. The HLDAA legislation was used a total of six times during that eight-year period. I do not believe that the HLDAA legislation has been abused. I do not believe that the present method of operation is directed towards encouraging the practice of collective bargaining and arriving at collective agreements.

We believe that access to first-agreement arbitration should be unimpeded and guaranteed. We believe that the government should live up to its promise to deliver to the workers of Ontario a guarantee to avail themselves of the right to have their first collective agreement arbitrated when the collective bargaining process fails. Quite frankly, we deem subsection 40a(2) of the proposed legislation to be unacceptable. We think it gives the Ontario Labour Relations Board the right not to direct the settlement of a first collective agreement if it does not appear to the board that collective bargaining has been frustrated, as provided for in clauses (a), (b), (c) and (d).

If the parties cannot come to a first collective agreement, why must either of the parties lead evidence as to why it has failed? This government need not satisfy itself as to why bargaining has failed in first agreements or conduct inquiries through the labour board as to who was or was not frustrated and who was or was not uncompromising. The fact of life is that bargaining has failed and normally a strike ensues.

The legislation ought to provide a means of reducing first-agreement strikes and arriving at first agreements when the bargaining process has failed and one party wishes to go that route. The legislation does not mandate the parties to apply; it gives them an option. We think it should provide for agreements to be reached so that the parties can work under the collective bargaining agreement for a period of time.

As I said before, the preamble of the Labour Relations Act encourages the practice of collective bargaining, but many times the practice of first agreement fails. Give the parties an honest and clear way of correcting that failure. Do not impede the correction by placing ambiguous tests in their path.

We submit that subsection 2 should read, "The board shall grant such application under subsection 1 within 30 days of receiving the application."

At the present time under subsection 40(1) of the Labour Relations Act of Ontario, employers have the right to request a vote on their last offer before or after a strike or lockout and the minister must direct that a vote be held by the people in the bargaining unit. It is our submission that the government would not be breaking any new ground if it provided in the legislation that the labour board was mandated to grant a first-agreement application.

2:20 p.m.

Please turn to table 1 of the document from Manitoba Department of Labour, research and planning, dated March 1985. This is a province that has first-agreement legislation with the right to automatic access of either party. You will notice in there that 150 certifications were granted in the three-year period 1982 to 1984. There were 13 applications made to the Manitoba Labour Board for first agreements, an average of 8.7. The board imposed first agreements in six of these cases. That reflects a four per cent ratio. I do not think it can be said that the collective bargaining process has broken down and that collective bargaining is not taking place.

If you look at table 2, you will find that is even more so. In the 13 applications made to the board in Manitoba, five were settled voluntarily by the parties. In my opinion, that the parties know they are going to get a collective agreement encourages them to reach an agreement on their own.

Some people who have or may in the future come before this committee will tell you they want the labour board or some board of arbitration to settle their collective agreements. Quite frankly, we do not. We would far rather reach agreements between the parties, because we think an agreement worked out by the parties is one they will understand and be able to live with better than one that is imposed. However, when you cannot get a first agreement negotiated, we think there has to be some avenue for the unions or the employers to use to get a collective agreement in place without the necessity of a lengthy and, in some instances, damaging strike.

If you read the report from Manitoba Labour, the point you will all recognize is that the parties did not abandon the collective bargaining process in first agreements and rush to the labour relations board to have it solve their problems. Only in four per cent of the cases was it necessary for the labour board to become involved and actually mandate a collective agreement.

In respect of the cost of the process the proposed legislation intends to create, in my respectful submission, private arbitrators in Ontario in most instances charge fees which are far in excess of the ability of a small employer or a small union to pay. To have to go through the legal process of appearing before the labour relations board or any other tribunal is costly. If you look at the recent Commerce Visa Centre situation, you will find that took 17 or 18 days of hearings. Undoubtedly, the parties in that circumstance were better equipped financially to handle the costs--at least one of them was, I am sure. However, a small union or a small employer is not equipped to handle those costs. To have to go through that process to get a first agreement mandated and then have to bear the cost of having one of the private arbitrators in Ontario hand down a decision based on the number of days of hearings is putting a burden on the small employer and on the small union that should not be there.

As an example, we had a case a few years ago with Maclean Hunter Ltd. Undoubtedly, it had the money to pay the lawyers and appear before the board in an attempt not to get a first agreement legislated under federal jurisdiction. It broke the local union, which had to go into the hole for its costs in regard to that matter. At the end of all the discussions, the Canada Labour Relations Board handed down a decision that said it was not going to mandate the agreement because there was no blood in the streets.

We think access to that legislation is provided for unindured under the Hospital Labour Disputes Arbitration Act. The government pays what it deems to be the appropriate costs for the chairman and for the other persons on the panel. We think it is in the interest of the public not to have first-agreement strikes and that the public purse should share a part of that burden.

The board of arbitration, in referring to the methods it should use in determining what a collective agreement will contain, quite frankly, is not what the people on this committee and the members of our union think is advisable. We should not have to go into arbitration in any area at all to get a first collective agreement and spend an inordinate amount of time, which I believe would be spent, on whether the parties had made reasonable efforts to reach a collective agreement, as is stated in clause 40a(15)(a).

We do not believe that clause 40a(15)(b), "the terms and conditions of employment, if any, negotiated through collective bargaining for employees performing the same or similar functions in the same or similar circumstances as the employees in the bargaining unit," should be the determining factor.

We do not believe there should be any test, quite frankly, other than that the board of arbitration should take into consideration anything it deems to be relevant in respect to the fair and reasonable terms and conditions of employment that exist under collective agreements. The provisions of a collective agreement in a particular set of circumstances should be handed down so that they reflect the economics of that set of circumstances and not the economics of everybody else's set of circumstances.

We have had two very lengthy strikes in our union while I have been the director. One lasted for 34 months with Zeller's Ltd. in Lacnute, Quebec, and one went for more than two years with Canadian Tire Corp. Ltd. in Prince George, British Columbia. Both of those, oddly enough, were first-agreement strikes. Once the parties get into the collective bargaining process, we have a fairly low ratio of strikes involving our membership in Canada. The strikes that exist, I respectfully suggest, do not last very long.

2:30 p.m.

One of the problems in the collective bargaining process in Ontario, and indeed in some of the other provinces, is that the Labour Relations Act sets up the confrontation in many instances. In Ontario, you have petitions that are filed when an application for certification is put before the board. The anti-union instrument that is used to create that petition is then carried forward into the collective bargaining process, and as a result, I believe in many instances the employer feels he has to protect those people who are fighting the union on his behalf. You will eventually wind it down to a first-agreement strike, because the employer is down to not have a collective bargaining agreement covering the employees in that establishment.

Our union, the United Food and Commercial Workers International Union, undoubtedly would like to get the best collective agreement covering every group of employees that it organizes. We are not walking around wearing rose-coloured glasses; we are living in the real world. We know that mandated, legislated first agreements are not going to be the Utopian agreements we may have in various industries, but we believe those people are entitled to a collective agreement.

They go through the process of getting organized, at some jeopardy to their jobs in a lot of instances. They then receive certification from the Ontario Labour Relations Board. The wording states that "the parties shall bargain in good faith." Lawyers have a field day deciding how to posture themselves so they will not be found guilty of bargaining in bad faith. If the legislation were to be implemented in the way it has been introduced, you could give out Academy Awards on any given day, perhaps to both sides of the bargaining table, because to ensure that they complied with the legislation, the collective bargaining process might become secondary and the posturing their primary concern.

As the legislation is written at present, it does not and will not provide for first agreements. We think it will provide a field day for lawyers appearing before the labour relations board, and long-drawn-out hearings. In most instances it will not change the structure of collective bargaining in Ontario from what it is now.

That is all I have at the present time. If anybody has any questions, I will be only too happy to try to answer them.

Mr. Chairman: Thank you, Mr. Evans. We appreciate in particular the view of Manitoba's first-contract legislation.

Mr. Gillies: First, Mr. Evans, I want to pick up on your last comment. Would you rather have the bill as it is now or nothing, or do you think it makes no particular difference, except to the legal profession?

Mr. Evans: Mr. Gillies, I do not think the present bill does anything for the collective bargaining process in Ontario. If I were faced with a choice of having nothing or having that bill, I might come down on the side of having it exactly as it is, which is nothing. I do not think it has changed anything.

Mr. Gillies: It would not do anything? You do not see any particular advantage to the status quo as opposed to this. It just does not change anything?

Mr. Evans: When you put in the procedures how to gain access to the legislation, you almost render the process useless. I would like to believe otherwise. Certain ministers of the government and other legislators have said the test is not bad-faith bargaining. In my considered opinion, it is.

Mr. Gillies: You have had considerable experience over the years on these matters. As far as you are concerned, are these preconditions tantamount to bad-faith bargaining?

Mr. Evans: Yes, I believe absolutely they are. With regard to the refusal of the employer to recognize the bargaining of the trade union, for example, if the employer were to stand up and say that in a collective bargaining scene and you went to the labour relations board, he would be found guilty. Again, on the uncompromising nature of a collective bargaining position adopted by the respondent without reasonable justification, in my opinion, if you went to the labour relations board, that would be deemed to be bad-faith bargaining. The next one is simple. They have not reached a collective agreement, period. That does not necessarily mean bad-faith bargaining.

Mr. Gillies: Then clause 40a(2)(d) is the catch-all.

Mr. Evans: If you put in clauses (a) and (b), and they get wiped out because you cannot meet their criteria, I do not know what the other relevant matters are.

Mr. Gillies: There is considerable sympathy around here regarding clause 40a(15)(a). In similar legislation in other provinces, are you aware of a direction such as that being given to the arbitrator with regard to taking into consideration whether reasonable efforts have been made to resolve the agreement?

Mr. Evans: I am not aware of that.

Mr. Gillies: I think there is some sympathy here. It would seem to be almost a superfluous instruction to the arbitrator. They have already been through the threshold in subsection 40a(2). As many of us would see it, the

job is for the arbitrator to darn well come up with a settlement that one would hope would not be totally unacceptable to either of the parties. Why do you really need clause (a)? What does it accomplish?

Mr. Evans: You have hit two points. If you go back and look at the Manitoba statistics, you will find that if a first agreement is at the end of the road, the parties will work towards resolving their own problem, which is where it should be. To say to an arbitrator that he has to decide whether a party has been reasonable, we could probably spend six months of debate on what the word "reasonable" would mean in that context. To say that if you have been more reasonable than your opponent you will get a better collective agreement, and that if you have been unreasonable you will get a bad collective agreement, misses the point of what the legislation is all about; that is, to provide a collective bargaining process for the workers of Ontario, to allow them to bargain collectively.

For anything that is conduct-related, if it is in violation of the Labour Relations Act, one party should take the other before the board, get a consent to prosecute and deal with it. The matter of getting a collective agreement is not conduct-related; it is related to getting a collective agreement in place covering the employer and the employees. I am not so naïve I might not think of some set of circumstances where a union might not want to get an agreement with an employer. I think the employer should have the right to get a collective agreement.

Mr. Gillies: I have one last question. I am looking at your chart at the beginning of your presentation regarding the strikes you have had in your regions 18 and 19. You might not have this statistic in front of you, but I am just looking for a general idea. Generally speaking, have these disputes you list been longer, on average, than other strikes would be because they are first-agreement strikes?

Mr. Evans: First-agreement strikes, on average, are longer. Let me run it down for you. Little Brothers Ford was probably a five- or six-month strike; there was no agreement. Niagara Farms retail food stores was an eight-month strike, with no agreement. Bob Kernohan Lumberteria was six months, with no agreement. Newt Webster produce warehouse was four and a half or five months, with no agreement. Davidson-Walker Funeral Home was eight months, with no agreement. St-Hubert Bar-B-Q was one day and we had an agreement.

Mr. Gillies: That was a good one.

Mr. Evans: Westra Plastics has been on strike for three months, with no agreement; it is still on strike.

Mr. Gillies: How many months was that?

Mr. McCormick: It was three months and it is still on strike.

Mr. Evans: S. S. Kresge was five and a half months and they got a settlement. White Otter Inn was about three months, with no settlement. F. W. Woolworth Co. Ltd. was about two months; we got a settlement. Santa Maria Foods Ltd. was about three months and we got a settlement. At Robert Michaud Ltd. furniture, there was no settlement.

2:40 p.m.

In the bottom half of the list, K Mart Canada Ltd. was six months, with no settlement. Darrigo's Supermarkets Ltd. was about four months, with no settlement. People's department store was about a month and a half; they got a settlement. IGA Canada Ltd. in Fort Erie got a settlement in about 30 days. I believe that at Maple Lodge Farms Ltd. it went on for three or four months and they got a settlement. Bon-Ee-best Eggs was not that long; it was about a month or less.

Mr. Gillies: Okay. I can see the pattern developing here. They tend to be fairly lengthy, and in most of them you did not get an agreement. In that same period of time how many agreements would have been reached without strikes?

Mr. Evans: The only one on which I can give you an accurate count is a local union where they received 38 certifications in an eight-year period. Ten were nursing homes, all of them under collective agreements. Of the remaining 28, there were six strikes. One of them was resolved with a settlement; five were not. Eighteen other units never had a strike, because we could not reach a collective agreement and the people were--and I am not trying to be dramatic about it--just beaten. They were beaten through the collective bargaining process.

Mr. Gillies: Normally, that would then lead to a decertification?

Mr. Evans: Or it just sat there and vegetated.

Mr. Gillies: Does that happen often in your experience?

Mr. Evans: Yes.

Mr. Gillies: Despite all the provisions and all the legislation, the thing just grinds to a halt and nothing happens?

Mr. Evans: Our union organizes about 8,000 people a year in Canada and we probably organize 80 per cent of those people in bargaining units of 50 or fewer. Our ratio of getting collective agreements probably runs somewhere in the 60 per cent range across Canada.

In some provinces we have first-agreement legislation, and it works. In Quebec, because of the labour laws there, very few certifications are granted for which collective agreements are not obtained. In Manitoba it is the same thing. In Manitoba we have received 20 certifications since 1982 and we have not had a first-agreement strike.

Mr. Gillies: I have one final question. We asked one other union local that was in--and I wish I could remember which one--whether it felt that this legislation would lead to increased union membership or would make it easier to organize in the broad sense. Their response was no, that they did not really think it would make much difference. What do you think?

Mr. Evans: I do not know whether it would lead to making organizing any easier. I am sure it would lead to those people who did organize getting collective agreements. If you do the mathematics on that, it should lead to increased membership. What we have now is a process you go through at the Ontario Labour Relations Board whereby people get certified and do not get a collective agreement.

Mr. Gillies: Thank you, Mr. Evans.

Mr. Chairman: I wonder whether I may just ask you a question. I am somewhat surprised by your statement about the legislation, because you had a lot of agony associated with those first-contract disputes with not a very good solution to them, and yet even given that, you feel this legislation is not worth while.

Mr. Evans: In my opinion, getting the collective agreement is worth while. When you put the hurdles in subsections 40a(2) and (15), I think it is a sham. I do not think there is any meaningful legislation there. I want to see some of the people whom I deal with in the legal community practise their acting to make sure they are not guilty under subsection 40a(2). Once you put that in there, then I feel that my level of frustration will not go down at all. I do not think it will get the workers of Ontario collective agreements; and that, I understand, is the intent.

Mr. Callahan: I would like to take up something. It is the first time I have seen anything about the cost of the chairman appointed; that would be borne by the provincial Treasury. Are you suggesting that this be carte blanche, that it does not matter if one or other of the sides has been sandbagging or dragging its heels or could have been found to be acting in bad faith?

Mr. Evans: No. I put that piece in there and when I was talking about it, I went on. As you are probably aware, the Hospital Labour Disputes Arbitration Act provides for the arbitrated agreements in the nursing home and hospital industry to be paid out of the public purse. Under section 124 of the Labour Relations Act, the construction industry has a payment it makes very dramatically reduced from what the private-sector unions are faced with in this province in dealing with grievances. We are talking about people who do the bulk of the arbitrations in this province charging \$1,500 a day. If you have a 10-minute hearing, you can figure the bill will be only \$1,100 or \$1,200. We are trying to deal with that in a different forum.

The other part of the cost involved with which I dealt is that, if you look at the Visa hearing, it took 17 days of hearings to determine whether or not a collective agreement would be put in place. We had an experience with Maclean Hunter that went on for more than two weeks. The cost to a small employer and to a small local union is astronomical. The cost to a small employer and a medium-sized local union is astronomical, and in many instances they simply do not have the wherewithal to pay those costs.

In my opinion, it would not be out of order for the government to consider paying the cost of arbitration. At present, if an employer says he wants to have a vote on the last offer he made to a bargaining unit in a collective bargaining process, the government sets up the machinery, goes out and conducts the vote, and that is paid for out of the public purse.

Mr. Callahan: I do not have a copy of the bill. Does the present act provide that each party will pay its own arbitrator plus half of the chairman's charges?

With that clause there, where you are suggesting the government should pick up the tab, that seems to me less an incentive. It is one of the small areas that might prevent one party from sandbagging. If they figure it is not going to cost them anything, you have taken out any incentive for them to try to reach an agreement before it goes to arbitration or whatever.

Mr. Evans: Again, in Manitoba the cost of the process is paid for by the government. It is done through the labour relations board, but it is paid for out of the public purse. The statistics would not bear out what may appear to be a good idea you have about everybody going in that direction because they are going to have it paid for. They get it paid for and only four per cent of the certifications go that route.

Mr. Callahan: To use the equation of litigation in the normal sense, one of the criteria any counsel who is being honest would have to look at in whether the matter is litigated or settled before litigation is the question of having costs awarded against his client. I will accept what you say about Manitoba having had very few, but even one or two would not be helpful if they knew the purse was there from which to collect their costs.

Furthermore, you have commented that you do not want to go and listen to lawyers perform their acts.

Mr. Mackenzie: Amen.

Mr. Gillies: Careful, Robert.

2:50 p.m.

Mr. Callahan: It can be said that sometimes the expediting of trials is effected by agreement on certain facts, simply because both parties know there is not a bottomless pit from which they can retrieve their costs. If you are giving a bottomless pit here, you might find that some of these hearings might even go on longer than that.

I am not attributing any aspersion on the profession; I am just saying that is a natural--

Mr. Evans: Let me not let you get off track for a moment. We are not proposing that the costs of the counsel of the parties be paid. We are proposing that the tribunal that hears the matter be paid.

Mr. Callahan: That is true.

Mr. Evans: We are not proposing that our legal counsel or someone else's legal counsel be paid. That will break both the trade union movement and the employer some day. It will get all the small employers out of business.

Mr. Pierce: Mr. Evans, would you not admit that actually the cost of the arbitrator is a small cost of the whole process for both the union and the employer because in both cases they are hiring legal counsel? In most cases, certainly in the cases I represent in northern Ontario, it requires a fair amount of travel because these things are not heard in the local municipality; they are heard wherever Air Canada makes its last stop.

Mr. Evans: I agree with that.

Mr. Pierce: There is an additional cost both to the employer and to the employee to have representation. The cost of the arbitrator is another cost, but it is a small part of the whole cost of the process.

Mr. Evans: I am not too sure that is correct. I will go to northern Ontario for you. If the Woolworth unit in Kenora, where Air Canada does not stop, had gone through binding arbitration to get the settlement, undoubtedly

our local union in Thunder Bay would have had its representative conduct the process. The cost, as far as the cost to the membership is concerned, we would hope would have been kept minimal. Having an arbitrator come in at \$1,500 a day plus expenses is not a minimal cost. It may be a minimal cost to Woolworths, except they are not doing too well. Sometimes, depending on the unit, on the number of people and whether they are part of a composite local union or just a local union of their own, the cost of an arbitrator can be gigantic.

Mr. South: You indicate you would like automatic access to arbitration as opposed to this legislation.

Mr. Evans: Yes.

Mr. South: We heard statements this morning that there are very few second agreements where a first agreement is imposed, and they gave British Columbia as an example. What would your comment be in that regard?

Mr. Evans: To start with, there are very few agreements opposed in British Columbia. That is the first thing.

Second, if you look again at the Manitoba statistics, out of the six agreements imposed, three were still in effect when these statistics were done; one was negotiating for a renewal of the collective agreement and the board had received an application for decertification; and two second agreements were arrived at. So you have one out of six where you can use those statistics.

We have had a collective agreement imposed only once in the province of Quebec. We are in the process of having another one--an application by the employer, not by the union. We renewed the collective agreement.

The thought may be correct. The thought may be that getting the second collective agreement in those circumstances is hard. Undoubtedly it is not as hard as getting a first collective agreement, because the parties have had a period of time to live with each other and to work under a collective bargaining agreement. I do not believe that because you have an imposed first collective agreement, you are automatically going to have a strike in the second one.

Mr. Pierce: Just for clarification: In your remarks you said the public should not be expected to suffer the burden of strikes because of first contracts. Do you believe the same thing in second, third and fourth contracts?

Mr. Evans: Where are you?

Mr. Pierce: It is not part of your remarks, but it was part of your comments. Your comment was that the public should not be expected to suffer the burden of strikes because of first contracts. That was in reference to the fact that strikes for first contracts were long strikes and in many cases they were destroying strikes because they separate family and friends and everything else in the community.

Mr. Evans: I do not believe I said the public, but I may be wrong.

Mr. Pierce: That is what I understood you to say.

Mr. Evans: I think the interest of the public would be served in not having first-agreement strikes. A lot of them are long and costly. I recall the Fleck Manufacturing strike; I do not know what the budgetary cost of that was, but it must have been horrendous to bring all those people from their normal domain and house them in there. Undoubtedly the cost in that situation was great. The cost of the Blue Cross strike was great. The cost to the public purse is already great in first-agreement strikes.

I think you will find, where parties have a history of collective bargaining that, one, you do not have the violent strikes and, two, the length of the strike is diminished. If General Motors or Chrysler were negotiating for a first collective agreement, it would not be over in 10 days. If they are negotiating for the renewal of the collective agreement, there is a certain test of economic strength between the parties and a settlement is arrived at. The purpose of the exercise is not to negotiate a strike. Quite frankly, any idiot in the world can negotiate a strike; it takes a little grey matter to negotiate a settlement. We believe in settlements.

To the best of my knowledge, and I have been in this union full-time since I was 19 years old, we do not program a strike when we draft the proposals for the contract. We never have, and I hope we never will. We draft proposals that are going to get us a settlement, and in an overwhelming number of instances they do.

Mr. Taylor: I wonder if you could clarify your answer on the point Mr. Pierce raised. You say in your submission, "Government must live up to its promises and deliver to the workers of Ontario a guarantee to avail themselves of a right to have their first collective agreement settled by arbitration when bargaining has failed."

Mr. Evans: Yes.

Mr. Taylor: There seems to be a right that you are suggesting is there to a first collective agreement when settled by arbitration if you cannot negotiate one. As I understood the question, which I want clarified, it was if you cannot settle the second, the third or the fourth contract by the normal bargaining process, does the workers' right to have an agreement disappear?

Mr. Evans: Both sides, in my opinion.

Mr. Taylor: Does that right exist only for a first contract?

Mr. Evans: As I read the newspapers, I understood the program of the government was to introduce first-agreement legislation. There are collective agreements around the country that have a process for settlement in them. I think just recently of the Public Service Alliance of Canada and the federal government coming up with some program, but that is a negotiated program between the parties. If the parties want to do that or anything else in the collective bargaining process, then I think it is their right.

I do not think what we are talking about here is the legislating of arbitrary settlements. I think what we are talking about is implementing the collective bargaining process. If you implement the collective bargaining process, then it is to be hoped the parties will carry on the process after the first agreement is done.

Mr. Mackenzie: I had a comment when we got sidetracked a bit about the costs on Fleck Manufacturing. There was not only whatever the costs were to Fleck Manufacturing, and the costs to the workers who were out were fairly obvious, but there was also one hell of a cost to this province. On the key day, we have 509 Ontario Provincial Police officers billeted there. The answers we got back to the questions in the House were that the cost to the province exceeded \$1.5 million, a fraction of which probably would have settled that strike at the beginning, apart from whatever the hell the company lost.

We also have that kind of cost, but I think the real cost involved--and I do not know whether you would agree with this, Mr. Evans--is what I see from hitting a variety of different picket lines in first-contract disputes: the damage that is also done, apart from the costs that we talk about, in terms of people's perception of their rights as outlined, for example, in the preamble of the Labour Relations Act. When you get into a strike situation, you are not usually going to believe that you have got the police or anybody else on your side, especially if they are bringing in strikebreakers to operate that plant. I have seen some pretty dramatic examples of people who have lost a hell of a lot of faith in our system because of long, bitter disputes just trying to reach first agreements.

Mr. Evans: Our members are probably no better or worse than the average union members in Canada, perhaps in the world. They are basically honest, law-abiding people. They find themselves joining a union to get a better way of life, and they end up in confrontation with the police. They do not go out and drive past a police station at 90 miles an hour to get arrested, but when you have a first-agreement strike, they look at people going in to take their jobs and there goes their mortgage, their family and everything else. It would take somebody with a lot more courage than me to stand there and say: "That is fine. Go ahead and do it." They do not. The facts in history will relate that to you. That is one of the reasons why we should have access to the first agreement and have a first agreement resolved.

Number one, the union and its membership will not be 100 per cent happy with it. Number two, the employer and the shareholders or whoever are on the management side will not be 100 per cent happy with it. That is probably the way to do it because the next time they will go to the collective bargaining table and hammer it out themselves.

I think, however, they will go to the bargaining table and hammer it out themselves anyway if the parties know there is a collective agreement there. If the union membership knows it cannot go out and hammer the employer into the ground and strangle him until he coughs up with five times more money than he has got, they are going to get a collective agreement. In my opinion, it has an effect on management and on labour of working towards getting the collective agreement. Again, in my opinion, that is what this committee, I and the rest of the people should be concerned with--getting a contract to cover them.

Mr. Pierce: Mr. Evans, I have a question with respect to the percentage of cards that have to be signed to apply for certification being 55 per cent. Does that not automatically put 45 per cent of the work force in opposition to the 55 per cent that have signed cards on first-contract legislation? You are looking at 45 per cent of the people who really do not want to belong to a union and who really want to stay at work, so

automatically you have strikebreakers behind the gates before the strike is called.

Mr. Evans: No, that is not the case. In most instances, the overwhelming majority of the people participate in first-agreement strikes if they have to occur. To say that 45 per cent are automatically opposed is not going to the Ontario Labour Relations Board very often. I have been there too many times in the past 28 years. You go in there and you get 80 out of 82 or whatever the percentage is. It was not too many years ago, Mr. Pierce, that the percentage was 65.

Mr. Pierce: That is right.

Mr. Evans: It was reduced by the government, and I think it should have been reduced. In many areas of this country, it is decided by a majority. The majority decide they do or do not want a union. That is the so-called democratic process. I get elected by a majority.

Mr. Pierce: Most of us do.

Mr. Evans: Some do not.

Mr. Taylor: But by ballot, secret ballot. I think you are right. If it is a secret ballot, then I think you are right.

Mr. Evans: In Ontario, they have to sign and pay a dollar. In my experience, if you do not pay the dollar--

Mr. Ramsay: You see; they pay their own dollar.

Mr. Evans: Mr. Taylor, if there were a unit of 100 people and one of the 99 people whom the organizer signed up does not pay the dollar, then none of those people receives certification.

Mr. Taylor: I am sure it will get paid.

Mr. Evans: In some instances, it does not, and in some instances, the applications are dismissed.

Mr. Mackenzie: Or prove somebody else paid it. You can lose even if you have 100 per cent--

Mr. Evans: If you and I were sitting on a stoop and we both signed a union card and I paid your dollar, we would not get certified.

Mr. Taylor: If it came out.

Mr. Evans: It does come out.

Mr. Callahan: I want to jump in here before this becomes a real contest.

As I understand from Mr. South's question of you, and I read through your brief, you are at the other end of the ambit; you are saying there should be access without any preconditions whatsoever. We have heard a number of them. The bill itself has certain preconditions. We heard Mr. Shell of the United Steelworkers of America who proposed something else. Now we have you saying none at all.

From the facts and figures I have heard over the period I have been sitting on this committee, the legislation is meant to address a problem that arises very infrequently in terms of the overall collective agreements that are negotiated in this province. We are dealing with something that requires some intervention. If you are saying no preconditions whatsoever, then are you not saying that in all cases there will be a collective agreement imposed by arbitration and are you not jumping from what before was quite obviously not working, the bad-faith test? From what I gather, it was very difficult to prove bad faith at the board, although in some of the fact situations I heard, I could not believe the board would not find bad faith. Mr. Mackenzie very kindly suggested that perhaps I would like to leave politics and sit on the labour relations board.

Mr. Evans: I do not really think you would enjoy that.

Mr. Callahan: Let me try this on you; I would like your view of it. As the bill is currently framed, do you consider the precedents that are required to go to arbitration as constituting the same thing--bad faith--as it has in the past?

Mr. Evans: Absolutely. You would have to have bad faith on clause (a). I am not a drafter of legislation; I am one of the poor people who have to work under it. If an employer stood up and said, "I refuse to recognize the authority of the trade union to bargain on behalf of my employees," then undoubtedly you would march him down to the labour board and he would be found guilty of bargaining in bad faith. That is my opinion.

Mr. Callahan: Okay. Let us take it a step further then. If your group is saying there should be no preconditions whatsoever, why should there ever be a first contract that would be negotiated by the parties?

3:10 p.m.

Mr. Evans: There are no preconditions in Manitoba and there are collective agreements negotiated by the parties. Ninety-six per cent of the certifications out there are not going to get an imposed collective agreement. If your thought is that you are going to wipe out the collective bargaining process by putting this procedure in, the facts do not really say that is the case.

We get certified in Quebec for 100 bargaining units a year at a conservative estimate. In 1978 they brought in the mandated first agreement. We have been involved twice. The membership with which I have a direct concern in Quebec is about 35,000 members. It does not occur. It is not the case because our union, and I believe most of the employers, would rather bargain a collective agreement. They would rather have the deal worked out at the bargaining table by the two parties than have a third party come in and resolve the issue.

You can take it three or four steps further and go to what we now have in Ontario; that is, expedited arbitrations. I forget what the last numbers were, but in the range of 80 per cent of cases are resolved before they get there. They know there is going to be a resolution to those things. We now have legislation that says you shall not have a strike during the term of the collective agreement if you have a dispute over whatever the terms of the collective agreement are. That is arbitration.

The process is already there, but it is not there in dealing with a first agreement. I do not profess to be a lawyer, but I sometimes practise before the Ontario Labour Relations Board. I sometimes read sections of the act that say the board already has the authority to make whatever decisions it wants to make to direct the parties to reach a collective agreement. The board says it does not have that authority. We are looking for something that says in first agreements it does have it.

I would not want to get into a position where I cannot sit down with the employer and negotiate the contract. I think that is the best way to go. We have the major supermarket industry in this country organized. Of the chain stores in Canada that are organized, we probably represent 83 per cent and we have very few strikes.

Mr. Callahan: Okay, but in the Manitoba brief they did not go immediately into a nonpreconditioned situation. They first had preconditions and then they went to a nonpreconditioned situation. You jump directly from a bad-faith test to a nonprecondition situation. Do you not see that this may very well result in employers considering that they have now lost all their rights? You are trying to curb the intransigent individuals, the people who are deliberately trying to avoid not only collective bargaining but also union rights that have been certified. In your suggestion, in trying to deal with them, you are going the full gamut. All employers are going to look at it as an act of this Legislature that takes away whatever rights they had before, even though they worked.

Mr. Evans: I disagree with you, Mr. Callahan. I do not think it does. You are presupposing that every certification that goes through the OLRB will result in the first agreement being arbitrated. I think the Legislature should tell the employers and the unions in Ontario that if a group of employees is certified, there is going to be a collective agreement.

If the parties both know that and do not know what the collective agreement is going to contain, they are going to go to the bargaining table and bargain their own agreement. That is the experience in Manitoba and in Quebec. Quite frankly, the experience in British Columbia is null and void, zero minus 10. You could not get a first agreement legislated out there if you came from much higher authority than human beings come from.

Mr. Gillies: Do you not agree, Mr. Evans, that this legislation more closely resembles the BC legislation than that of any of the other provinces I have looked at?

Mr. Evans: I have to be honest with you, Mr. Gillies. The BC legislation does not work and I have not read it.

Mr. Gillies: It is very similar to this.

Mr. Evans: Then this will not work either.

Mr. Chairman: We are running a bit behind. Can we move right along?

Mr. Callahan: I want to go on to Mr. South's further point that in Manitoba there have been some--probably it relates to the percentage of companies here that have resisted a first contract in an obvious view not even to recognize the union has been certified--that never got to a second contract because of the imposition of the first contract.

Mr. Evans: I do not think that is correct. I do not think it did not get to the second contract because of the imposition of the first contract. It may not have got to the second contract for a great number of reasons.

Right at the beginning, before you came in, I mentioned we have a local union in the province that had six first-agreement strikes but also had 18 certified bargaining units that never got an agreement because they were wiped out in the collective bargaining process. That is 24 out of 38--one of those resulted in an agreement--in the particular local union, and that local union has 120 collective agreements. Frankly, that number says there is something wrong with the system.

Mr. Callahan: I think we are all ad idem that there is something wrong with the bad-faith test, but that is fine. Thank you.

Mr. Mackenzie: I am not sure whether my colleague Mr. Callahan was with us from the day of the presentation of the United Steelworkers of America. There is a fairly common theme that comes through from time to time, which Mr. Callahan repeated again today, that Mr. Evans is at one end of the spectrum as against the steelworkers at the other end. That is incorrect and should be pointed out.

An entirely different presentation was made by the steelworkers. They made it very clear that they would prefer it totally open. They did not think it was going to lead to automatic arbitration; most of us who have been involved in the trade union movement are not enamoured with automatic arbitration and we are dealing here with a specific problem. They said they would much rather have the open access.

Both the director, Mr. Gerard, and the legal counsel, Mr. Shell, said: "If you want to give us that; fine. We will accept it. That is our first choice but"--they made it very clear--"we know that is not the route the government is going." Therefore, as far as they were concerned, the issue was whether they could come up with amendments that would give them the opportunity to achieve that contract without having a long, extended dispute before the board. It is not that they are at the opposite extremes. They took the same preference that was stated here by Mr. Evans.

Mr. Callahan: I read the briefs and I did not get that, but I accept--

Mr. Mackenzie: That was made fairly clear through some of the questions that were asked.

Mr. Evans: Mr. Callahan, if you ask whether there are any preconditions we could accept, I will give you a thousand of them. There are. If you cannot reach a collective agreement within six months and you go through the conciliation process--between the 17 days that the mediator is appointed, you have the right to apply; you have to go through the collective bargaining process. We do not want to frustrate the collective bargaining process; nor do I want to be frustrated by the word "frustrated" in the proposed legislation, which says, "collective bargaining has been frustrated because of...." Ted Stringer and McKillop would work months working that "frustrated" into nonfrustration as long as somebody paid the bill.

Mr. Mackenzie: How could they make any more money than they are already making?

Mr. Evans: I do not know.

Mr. Chairman: We have had enough vicious attacks on the legal profession today. Mr. Evans and Mr. McCormick, thank you for coming before the committee. You have been most helpful and have provoked an interesting debate.

Mr. Callahan: I will have 10 copies of that and send it to all members of the legal profession.

Mr. Chairman: The next presentation is by the Toronto Typographical Union. I believe Douglas Grey and Richard Weatherdon are here. Please come to the table and tell us who is whom.

3:20 p.m.

TORONTO TYPOGRAPHICAL UNION LOCAL 91
AND INTERNATIONAL TYPOGRAPHICAL UNION

Mr. Grey: My name is Doug Grey; I am the president of the Toronto Typographical Union. This is Richard Weatherdon, representative of the International Typographical Union.

Mr. Chairman: Copies of your brief have been distributed. Yesterday we heard from an employer whose employees are represented by your union; so we are most interested in hearing your presentation today.

Mr. Grey: We thank the committee for the opportunity to present our thoughts regarding first-contract arbitration. It is not printed in our brief, but there is one thing I would like to comment on. When I go out and talk to students in the graphic arts industry at Central Technical School and George Brown College, I always tell them that they have the right to belong to a union and that it is the same as the right to freedom of religion and freedom of speech; that whenever they hear about ball players or hockey players, all these players have representatives and that anyone worth his salt these days has someone representing him; that the young people who are going out into the work force should keep in mind that the union would be the best route to go with a collective agreement and a signed contract so they know what their working conditions are.

Keep that in mind. It is something I tell students and something we should all look at and keep in mind. This first-contract arbitration leads from that; it is their right to a union.

Mr. Pierce: Are you suggesting that legislators should organize?

Mr. Grey: If you have ever been involved in certification, you will know that workers are afraid of getting organized; they are afraid of losing their jobs. That fear in itself is a very agonizing thing. Sometimes people lose their jobs and sometimes it is very costly for the union to get them reinstated. That is a fear we live with daily when we deal with workers. All they want to do is have a union.

I will go through my brief.

In 1964, Toronto Typographical Union Local 91 was locked out at three Toronto newspapers. As a result, 900 printers and mailers lost their jobs for ever. I raise this bit of history to illustrate to the committee that when a union is beaten or destroyed by an employer, government seldom, if ever, comes

to its rescue. The 900 printers and mailers were forced to seek work elsewhere. Today, many are spread across the continent. They never returned to Toronto.

Then there is the opposite example. When the Amalgamated Transit Union was about to strike the Toronto Transit Commission, the government acted quickly with legislation to order them back to work or not to strike. The same held true for hospital workers when they were ordered back to work. The point is that when the unions have clout, the government acts, but when the unions are in trouble, government does nothing to help the unions.

We need changes to the Ontario Labour Relations Act that would provide the board with effective measures to fine and imprison both employers and unions who blatantly violate the law. At present, the board can only order the parties to continue bargaining; in other words, the wet noodle approach. I remind you that Jean-Claude Parrot and Grace Hartman, both union leaders, went to jail for violations of labour laws. I do not know of any employer who ever went to jail for violation of labour laws.

Our union, Local 91, is a small local of approximately 1,100 members, and we have about 40 collective agreements. Almost all our shops have 50 or fewer employees. In the main, we are successful in negotiating our own agreements, and strikes and lockouts are few.

Most of our negotiations are with small businesses, and it is not the intention of the union to put employers out of business. That would make no sense, as we would have few union members and the members would be without jobs.

The problem arises when the employer decides he does not want a union. He often proceeds to hire a law firm that will help him to keep the union out. There are many law firms that specialize in this field, and they hold seminars to show employers how to de-unionize.

In our opinion, Burlington Northern Air Freight's lockout is a classic case for why we need first-contract-arbitration legislation. Toronto Typographical Union Local 91 was certified in November 1984 for the 30 warehouse workers. We discovered that Burlington Northern Air Freight was a division of the US-based multinational Pittston Co., which has among its holdings the Brink's armoured truck division. The company has taken on other unions in Chicago and Vancouver and has beaten them with strikes and protracted negotiations.

Collective bargaining began in January 1985 and proceeded slowly throughout the next few months. During negotiations, the company began changing the working conditions. Suspensions were handed out, and permanent employees were laid off and forced to bump into part-time positions, which were outside the bargaining unit as they worked fewer than 24 hours per week. Also, the employer hired scabs to work beside our members while we were still bargaining and before the legal deadline for a strike or lockout.

I draw your attention to appendix A. It is a letter that was sent from the president of Burlington Northern Air Freight, Jim Drake, to all the warehouse staff on May 7, 1985.

"Subject: Labour situation.

"On May 3, the company presented its final offer to every member of the bargaining unit, as well as your union negotiating committee and the Ontario Labour Relations Board.

"It is our understanding that a vote was conducted on Sunday, May 5, at which time the membership decided to reject this reasonable offer." That was rejected, by the way, by a unanimous vote of 25 to zero by secret ballot.

"On Monday, May 6, we continued to operate as normal but management have noticed that it is becoming increasingly difficult, under the present tense situation, as there have been increasing inaccuracies with respect to our bunking and checking in of freight.

"We would therefore request that each individual member"--and this is very important--"or collectively as a unit, advise management in writing of your acceptance of the offer dated May 3, or in the best interest of our customers and service standards, we must lock out all employees who have not replied in the positive at 0700 on May 8, 1985.

"Regards, Jim Drake."

On May 8, the company locked us out, and the union charged the company with an illegal lockout. Other charges were laid at the Ontario Labour Relations Board for unfair labour practices and bad-faith bargaining. These charges were laid in April 1985, and the hearings began in July 1985. The union had to call many witnesses because of the complexity of the case, and has not yet concluded it. Further hearing dates are scheduled for April, May, June and July of 1986.

The Ontario Labour Relations Board is so backed up that when it has a case of this magnitude, it takes a long time to be heard.

The whole exercise wears down the union supporters and helps only the employer. Law firms who specialize in this activity can delay bargaining and hearings for a long time.

If the objective of the Labour Relations Act is to bring equity between workers and companies, this is the very process that will defeat that purpose.

3:30 p.m.

It also becomes very expensive for the union. The locked-out Burlington Northern Air Freight workers have received approximately \$122,000 from the international strike fund as of December 31, 1985, and that is still being paid. The local union has spent about \$25,000 in legal fees so far, with about 13 hearing days yet to go.

The light at the end of the tunnel for the Burlington Northern Air Freight workers is this legislation. If enacted, they will be covered from January 1, 1984, under the retroactive provision. It becomes important to the union that effective first-contract arbitration legislation be implemented.

We are also aware that this legislation will not help in renewing contracts, but it may help to bring order to labour relations during the first two years. We hope the parties will learn to live with each other. Without the legislation, the employers will take the position that they can do whatever they want and no one can stop them.

We realize this legislation will be helpful at Burlington Northern Air Freight and some of our other first-contract situations, but we also must not lose sight of the goal of obtaining the most effective legislation possible for all concerned.

The legislation would be improved by making access to first-contract arbitration automatic both for the employer and for the union. This could protect both parties against economic sanctions if up against giant opponents. The present language allows for tests and interpretations that could be used by government appointees to alter policy when governments change.

Bargaining units must be protected against any scabs working in the unit on a return-to-work order. It is our position that scabs should not be hired at all.

In subsection 15, we feel picketer protection should be built into the legislation so that no-fault language would provide for both justice and orderly return to work. There is no reason why a work stoppage, with its minor bitterness, ought to spill over into the court after a back-to-work order.

There is some suggested language that I will not read out at this time, but I will leave it for you to read. I will pass this over to Mr. Weatherdon to make his presentation.

Mr. Weatherdon: I want to thank you for allowing me to make our presentation. I will give you a few preliminary notes.

When I was invited to give this presentation, I purposely decided to keep my presentation very short. I knew it was in the afternoon. What I have decided to do is zero in directly on some items which I feel you will be interested in and point out the need for first-contract arbitration language.

The International Typographical Union in Ontario is primarily made up of very small locals. I travel to other parts of the country, but when I am in Ontario I am dealing with locals numbering anywhere from 10 in a local such as Sudbury to 1,100 in Mr. Grey's local, which would be the largest in Ontario. They are primarily in the 10 to 30 area and are very small locals.

I want to thank you and I would like to relate to this committee two situations which I feel point out graphically the need for first-contract legislation. I was personally involved with both situations.

In October 1982, 40 unionized employees of the Welland Tribune were locked out after six months of negotiations. The Welland Tribune is a Thomson-owned newspaper, and I am sure I do not have to dwell on the power and financial position of the Thomson empire. The Welland Typographical Union had organized 30 new members from the editorial, business office, sales and circulation departments. It had an existing unit in the composing room of approximately 10 people. The number of members in the local was approximately 50.

The Thomson-owned Tribune brought in scabs and immediately published a paper, and the future of the 40 locked-out ITU members looked dismal.

Classic issues such as union security, hours of work, overtime and wages were some of the outstanding issues. To give this committee a little flavour for the negotiations, the publisher at one point justified his wage proposal with the argument that he believed an employee's rate of pay should be decided

on after considering whether a person was male or female; whether or not a male was single or married and had dependants; and whether the female was married or not.

Mr. Chairman: They did not say who should get the most?

Mr. Weatherdon: I can elaborate if you like, but I think it is fairly obvious.

Mr. Chairman: I think we understand.

Mr. Weatherdon: The International Typographical Union decided to start its own newspaper in Welland in November 1982 because it was hopeless to picket and feel we could impose any economic difficulties on the multimillion-dollar Thomson empire. We thought perhaps publishing a paper would be damaging to the Welland Tribune and they would then sit down with us and negotiate a first contract.

After six months and many meetings called by the Ministry of Labour, the chief negotiator for the company informed me in front of the mediator that even if he could reach an agreement, and he thought that might be possible, the company did not have any openings to take back our locked-out members. Some of these members had worked for this company in excess of 30 years.

During this period, an Ontario Labour Relations Board hearing continued and the Welland Tribune was found guilty of violating the Labour Relations Act before the lockout by demoting our chief inside organizer. It ordered him reinstated as an editor. How could we impose this remedy on the company when we were locked out? It was never imposed.

One year slipped by, negotiations were less frequent and the company obviously was waiting us out. We could not beat this employer. Ninety per cent of the unit wanted a union and a first contract and this employer was not going to allow this to happen.

The dispute raged on for three and a half years and then, fortunately, I was able to sell our paper, the Welland Guardian Express. We achieved a first contract with the new employer, and I understand in April they are moving into a new building which was recently purchased by the new owner.

I feel first-contract legislation would have prevented this ugly dispute from continuing as it did.

The second case I would like to deal with is High Times Publications Ltd. and the St. Catharines Typographical Union.

Mr. Chairman: I am sorry if I keep interrupting your little story but I am confused about what happened there. You started up your own paper?

Mr. Weatherdon: Yes.

Mr. Chairman: Then you sold it?

Mr. Callahan: Then it was purchased.

Mr. Weatherdon: I asked my international to give us about \$1.5 million to start our own newspaper, which we invested over three years. Instead of picketing, the people would publish the paper in opposition to the

scab paper. I found myself in the position of a publisher for three years. As an international representative. I did not like the feeling. As it turned out we ended up being very successful. It was so successful that we sold it this year.

Mr. Callahan: Then you certified yourselves.

Mr. Weatherdon: Then we certified ourselves. I negotiated a first contract with the new employer. Everything is fine and rosy with the people. It is a sort of fairy tale.

Mr. Callahan: That makes it the way of the future. Who knows?

Mr. Weatherdon: I do not want to publish any more.

Mr. Callahan: You are becoming entrepreneurs I think.

Mr. Weatherdon: I am going to go on record as saying I do not want any more newspapers. It is quite difficult being a publisher.

The second case I would like to deal with is the High Times Publications and the St. Catharines Typographical Union.

In 1984, the St. Catharines Typographical Union organized a new unit of 12 people at High Times Publications, a company which produces a number of real estate papers in St. Catharines and distributes them to many Ontario cities.

This unit was certified on July 13, 1984. From the beginning, this employer tried to frustrate negotiations and diminish the unit. Within months he had reduced the unit to seven people by reducing hours of work to part-time status and by farming out work. For many months he refused to bargain with us until ordered to bargain by the Ontario Labour Relations Board. In one year we had managed to agree on only three clauses.

On June 6, 1985, High Times locked out all seven employees. Mediation talks have proven fruitless and, as of today, there are five members walking the picket line in St. Catharines. Is it not interesting that union security is also an issue here when 100 per cent of the members wanted a union? The employer does not want to force anyone into a union. He is philosophically opposed to it at the negotiating table, but he happens to be a full-time teacher and a member of the teachers' federation.

3:40 p.m.

Mr. Callahan: Is that the Ontario Secondary School Teachers' Federation?

Mr. Weatherdon: Yes. I sometimes wonder about his true motives. We need first-contract legislation for this case immediately or sooner.

The ITU does not need this legislation for all our first contracts. I have negotiated many first contracts, some in three months and some in a year. We have good relations with most of our employers, but we do need the first-contract legislation for instances such as noted above.

Mr. Gillies: Mr. Weatherdon, in view of the fact the next witness after you is the past president of OSSTF, would you like to stick around and ask him some questions?

Mr. Weatherdon: I will probably leave.

Mr. Callahan: First of all, I would like to clarify something about the jailing of Mr. Parrot and the president of the Canadian Union of Public Employees. I may be mistaken, but I thought it was as a result of defying a court injunction.

Mr. Grey: I believe it was over labour legislation, was it not?

Mr. Callahan: But was there not an injunction order in getting the union back to work? They actually were sent to jail for defying a court order. You are not suggesting that is inappropriate if a court order is sent out, are you?

Mr. Grey: No. What I am saying is that there is no remedy on the reverse side of that to the employer.

Mr. Callahan: I would think if the employer had been enjoined, if it was a court order enjoining the employer and he defied it, he would go to jail too.

Mr. Grey: I am not an expert in this, but I do not know of any union that has ever got an injunction against an employer. It is always in the reverse.

Mr. Mackenzie: I do not either.

Mr. Grey: I cannot comment on that.

Mr. Mackenzie: There are lots of company injunctions against picketing and against unions. I have never heard of a company getting enjoined.

Mr. Callahan: In any event, let us go to the two cases that Mr. Weatherdon suggested--and I do not have any expertise in this--plus some of the others that we have heard about, really horrendous situations. Maybe I should stick to these two first. Do you have any knowledge whether or not these were taken before the board on a bad faith application?

Mr. Weatherdon: Are you referring to the Welland Typographical Union?

Mr. Callahan: Yes.

Mr. Weatherdon: That is where we published our own paper. To my knowledge, we took them and found them guilty of firing a person, as I noted in my brief.

Mr. Callahan: Yes, I saw that.

Mr. Weatherdon: Bad-faith bargaining, in my opinion, could not have been proven.

Mr. Callahan: Under the facts that you related?

Mr. Weatherdon: I might just give you some background. In early 1976-77, I participated in the Ottawa Journal case, which is an historical one at the Ontario Labour Relations Board. It is used as a test case in a lot of cases for defining bad-faith bargaining.

The Ottawa Journal case found the employer guilty of bad-faith bargaining in five instances and ordered us to bargain. That was the remedy that was given after \$50,000 in legal fees and something like six months of hearings. The labour board came to our rescue with our 200 picketers on the line by saying, after three years at this point, "We order you to go back to bargain". One of our representatives at the time stood up to the chairman--I have never seen it done before--and said: "You are only ordering us to knock heads. You want us to kill them and they are going to kill us".

Mr. Callahan: What were the other remedies available to the board in that case?

Mr. Weatherdon: This is what we are saying. We need some concrete legislation such as first contracts. Let me finish.

Mr. Callahan: All right. I understand what you are saying.

Mr. Weatherdon: What I am saying is that I have to assess these things when I go into the local as an international representative. We are going to spend \$10,000 going to the board to get ordered to bargain. When a company such as Thomson employs such proficient lawyers, who make it look as if they are bargaining but they are not bargaining--I guess the word is "frustrated"--they frustrate negotiations to the extent that it would be ridiculous to go to the board because it would order the company to bargain, and we have been on the line for three years. What is the point? There are no remedies. We need remedies.

Mr. Callahan: To go back to my initial question, in those two instances do you know whether either of those two instances went to the board and whether they were successful on bad-faith bargaining?

Mr. Weatherdon: The Welland case was not taken on bad-faith bargaining. They were found guilty of violating the act by demoting a person.

Mr. Callahan: So there was no application made for bad-faith bargaining.

Mr. Weatherdon: Not to my memory. I cannot remember. In the other case there was. Because of the small local and the small amount of people involved, we had to withdraw it within the last three to four weeks.

Mr. Callahan: Was that because of economics?

Mr. Weatherdon: It was because of economics and because of large delays at the labour board. We had five people picketing during the winter months. The board delayed and set a date three months down the road. When we got there, we got into stalling tactics at the board. The labour board officer tried to get a settlement, as officers always try to do. Then they said: "Oh, gee, we are not going to be able to finish today. We will have to sit three more days six months from now." We still have five people on the picket line. It is still going to cost us \$10,000. I withdraw the case. There is no other remedy.

Mr. Callahan: My reason for asking is that it seems clear in these two cases that unless a finding of bad faith requires you to put a camel through the eye of a needle, I would have thought this case and many of the others we have heard over the period of time would pretty easily have been found to be bad-faith bargaining.

Mr. Grey: It takes so long to get there. We have bad-faith bargaining charges since last April at Burlington Northern Air Freight. It goes on and on. The chairman is sitting there hoping you are going to resolve it. All of a sudden, after a year, he starts saying it is serious. Do you know what I got? Two or three weeks ago, I got 13 dates set up for hearings after a year, when everyone realized they meant business and said, "They are not going to get a settlement, so we better hear the case."

Mr. Callahan: I understand what you are saying.

Mr. Pierce: Were you motivated by the fact that first-contract legislation is on the horizon?

Mr. Weatherdon: I certainly hope it is on the horizon. I had a feeling that we might have had first-contract legislation by February or March. I thought that last year. Obviously, it has been delayed a little bit. I certainly hope it is forthcoming, and that is my point in appearing here today. No, it was not the only factor; perhaps it was there.

Mr. Pierce: It would be one of them.

Mr. Weatherdon: It was because my numbers have dwindled so much. I do not know whether it is economically feasible or wise to spend that amount of money on four or five people.

Mr. Mackenzie: I have a very brief comment on the situation at High Times Publications. I have talked to a number of your people down there. There is some solid support but also a tremendous sense of frustration, almost hopelessness. I do hope they are not gone before we see some action. There are some good people in that unit.

Mr. Weatherdon: There are some very good people and thank you for your comment.

Mr. South: What does lockout mean?

Mr. Grey: A lockout is when the employer decides to lock the doors.

Mr. Mackenzie: It is when the employer goes on strike.

Mr. Grey: That is right. He locks out his employees, the people in the bargaining unit.

Mr. South: They are on strike and he locks them out.

Mr. Grey: No, they are not on strike. On Monday morning he puts up a sign that says: "You cannot come to work. You are locked out."

Mr. South: Can he bring other people in to work?

Mr. Weatherdon: He has.

Mr. Grey: In Burlington Northern Air Freight, he brought them in before he locked out the employees.

Mr. South: Is that legal?

Mr. Weatherdon: That is quite legal in Ontario.

Mr. Grey: At Burlington Northern Air Freight, he did it before the legal date for a strike or lockout. Talk about intimidating tactics. The people go to work and find someone standing right beside them. Each person had someone beside him for three days watching the job he did.

Mr. South: Are the dates the same for a legal lockout as they are for a legal strike?

Mr. Grey: Yes. When it is an illegal lockout, it means the employer did it for reasons other than to protect his bargaining position. He says: "This is my position and that is your position. I am going to lock you out." When he does it to try to break the trade union, which we allege occurred at Burlington Northern Air Freight, that is an illegal lockout. Our remedy before the board will be that it will find it is an illegal lockout and our people will be ordered back to work and be backpaid for that period of time.

Mr. Callahan: Do they always send a self-serving letter?

Mr. Grey: The letter is probably very revealing. Maybe I should not say it, but our best evidence is that letter.

Mr. Mackenzie: It could win you the case.

Mr. Grey: If nothing wins us that case, there is something else going on.

3:50 p.m.

Mr. South: I do not understand that point. When can an employer legally lock out? What is the kind of situation in which he is ruled to have an illegal lockout?

Mr. Weatherdon: An illegal lockout means an employer does not have the right to lock you out. He gets the right 17 days after the conciliation report has been handed down. Once you go through conciliation and the report is handed down, 17 days later he has the right to lock out and we have the right to strike. The Ontario government puts us in that position.

I would like to add one comment, since a remark was made on the teachers' federation. I meant no slur on the teachers' federation. I would like to explain that. My brother is a teacher, so I do not want anyone to misunderstand that. That is also the reason.

Mr. Pierce: Do not apologize.

Mr. Callahan: Is he bigger than you are?

Mr. Weatherdon: No. I want to say I have to wonder about the reason when an employer comes into the room and says to me he would never force anyone to be in a union when he himself is working under that condition. That is my point. There was no slur on the membership.

Mr. Callahan: He was wearing his entrepreneurial hat at that time.

Mr. Weatherdon: Yes.

Mr. Gillies: Did you know they are behind you and possibly armed? Is that the reason?

Mr. Weatherdon: No, I did not know that. I do not know whether this is recorded in Hansard. I was thinking my brother might read it.

Mr. Gillies: They were going to send him a copy.

Mr. Weatherdon: Nice people.

Mr. Mackenzie: It is not an entrepreneurial hat; it looks like a Liberal hat to me.

Mr. Pierce: I have a couple of quick questions which relate to first-contract legislation. When you, as a union, took over and started a newspaper, were you organized?

Mr. Weatherdon: What do you mean by that?

Mr. Pierce: Were your employees organized?

Mr. Weatherdon: They were members of our union working for a strike newspaper.

Mr. Pierce: How did the management team work as opposed to the--

Mr. Weatherdon: No, it was my condition. To pay picket strike benefits, you must perform strike duties or whatever other duty is assigned to you by the international. I assigned them a duty to work at the paper a reasonable number of hours. That is the way I got around it.

Mr. Pierce: The other one is again in reference to the owner of Bad Times--the High Times, not the Bad Times, corporation.

Mr. Weatherdon: I think you coined a good title there.

Mr. Pierce: Had there been any co-operation between the union and the federation with respect to the owner?

Mr. Weatherdon: I was not involved personally, but I understand the local St. Catharines typographical union made the other teachers and other members of the union aware he was doing this in negotiations.

Mr. Pierce: Thank you very much. The lightheartedness is nice in this committee once in a while. Every so often, it gets boggy.

Mr. Chairman: You help us make it that way.

Mr. Pierce: Thank you very much.

Mr. Grey: There is one other other point I might make; it was not in the brief. In a lot of small units, units of 50 and fewer, it is very difficult to get first contracts. That is basically where we are with the smaller groups. We are not like the United Steelworkers of America and some of those bigger unions which go after hundreds of people. The smaller units are very difficult to organize.

Mr. Pierce: I would like to ask the same question I asked the previous presenters. To apply for certification, 55 per cent of the membership is required. Would you be a lot stronger if that was 75 per cent?

I look at the 45-55 split. You have 45 per cent of the people in the plant who really do not want to belong to a union or have said they do not want to sign a card to belong to a union. They are automatically the strikebreakers. They are the ones who want to go back to work. They do not want to be off work nor part of the negotiating. They will benefit from the package once it is negotiated, but that is down the road.

Mr. Grey: You can see I am anxious to answer this one. Mr. Fitzhenry, from Fitzhenry and Whiteside, where we organized, was asserting the same thing. He said, "You want union membership and everyone to be members of the union." I said, "Well, 75 per cent or close to 80 per cent of the people joined the union." He said: "It does not matter; that is not enough. There is a minority there which does not want the union. I respect their rights." I said, "Look, I do not like the Conservatives but they won the election. I respect that right; they won."

Mr. Gillies: I am glad somebody remembers.

Mr. South: He is talking federally.

Mr. Grey: I said to him, "Remember that if the minorities are going to start ruling this country because of their rights, then we will have real problems."

Mr. Pierce: I agree with you 100 per cent.

Mr. Grey: That is the trouble.

Interjections.

Mr. South: You guys did not mind his voice around when you were a minority government.

Mr. Chairman: Order. Mr. Ramsay, could you bring us back to bill, please?

Mr. Ramsay: Certainly. Mr. Weatnerdon, we had Mr. Fitzhenry before this committee and he gave quite a long, extended anecdotal recounting of the negotiations that are going on right now between this newly certified local of yours and his company. To sum it up, he feels the negotiations are being stalled by the union because this legislation is coming. Do you want to put your side of this on the record before us this afternoon?

Mr. Grey: I think we have had 14 meetings. We have two units, a warehouse unit and an office unit, and we have two days in the office and two days in the warehouse. We are working from two documents and rather lengthy negotiations are going on, switching back and forth to committees. We suggested to the employer that we put them all in one unit and one contract. We said, "This is the best way to go." He does not want that, but he wants the right to be able to transfer the people who work in the office to work in the warehouse during certain periods.

We are suggesting to him the best way to go is with one contract. He said we are taking people away from their work and he asked us to start meeting at night. I said, "We have been talking about having a steward represent the people during discipline hearings with the employer," but he will not agree to that. He will not say yes to anything the union desires in the first contract, but he wants to hurry up the negotiations. He wants us to

agree to everything he wants us to agree to, and we have agreed to a lot. A lot has been done. Mr. Weatherdon was in on the negotiations just the other day. We are moving. We are meeting again next week, but the employer is very reluctant to look towards an easier, faster way of resolving all the issues.

Mr. Taylor: With respect, I think the question was unfair. Fundamentally, the question is: Are you deliberately stalling the negotiations with the expectation that this legislation will be in place retroactively so you can take advantage of it? I would not put that question to you. If that was the question, I do not think you would answer it anyway and I do not think you should have to answer it.

Mr. Gillies: I am glad you did not put it.

Mr. Weatherdon: I do not think very many unions want to have imposed contracts if they can possibly avoid it. I do not want anyone telling me what is going to be in our contracts. I want the union to decide. In cases I have noted, I have no choice but to accept an arbitrator's decision because I am not going to get an agreement on those items.

Mr. Chairman: That is a very common theme that is coming across to us.

Mr. Pierce: Does the union have any fear of the unknown, such as an imposed contract?

Mr. Weatherdon: You are darned right. I do.

Mr. Chairman: Thank you, Mr. Grey and Mr. Weatherdon, for your appearance before the committee. Thank you very much for your presentation.

The next presentation will be by the Ontario Secondary School Teachers' Federation, affectionately known by all as the OSSTF. We have Mr. Albert, Mr. Buchanan and someone else I do not recognize. Perhaps you can introduce your people. Welcome to the committee. We are pleased that you are here.

4 p.m.

ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION

Mr. Albert: Thank you. Members of the committee, before we go on, we have clean copies of our brief and we also have an additional document we would like to leave with the members of the committee from one of our units, Haldimand, organized under the Ontario Labour Relations Act.

We would like to take this opportunity to say that we welcome Bill 65. We think this initiative is long overdue. We would like to thank you, too, for the opportunity to comment on Bill 65 and to offer suggestions on some of the sections that, in our opinion, require special attention.

Our delegation is made up of Malcolm Buchanan, the past president, seated immediately to my left. To his left is Bob Ishibashi, who is local president in Haldimand and who has been involved in two years' worth of negotiations trying to win a first collective agreement under the Ontario Labour Relations Act for about 25 occasional teachers there. Ruth Baumann is to Bob's left. She is the vice-president of protective services of our organization. To my right is Jim Forster, our associate general secretary and a gentleman who has been involved in co-ordinating the Ontario Secondary

School Teachers' Federation's activities since 1984 in organizing under the Labour Relations Act. I am Rod Albert, president of the OSSTF. In our audience we also have Fred Birkett, who is the chief negotiator for the OSSTF in Metro Toronto and who has also done a lot of work organizing occasional teachers in the Metro area.

If I may just quickly take you through the introductory page, it gives you an idea of the scope and size of our membership, 35,570. You will notice that 570 are represented under the provisions of the Labour Relations Act. OSSTF has status as a trade union for purposes of the act. Since 1984, OSSTF has been organizing in a very deliberate fashion to bring the part-time teachers in this province who are not organized or recognized under the School Boards and Teachers Collective Negotiations Act into a collective bargaining reality. At this point these people essentially are not being represented.

The statistics near the bottom of the page give you an idea of the scope of the problem since 1984. It has been a very frustrating time. We have 11 occasional-teacher-unit applications covering 1,077 teachers still before the Ontario Labour Relations Board for certification. In addition, there are a further 18 applications for certification of continuing education units representing almost 2,300 additional teachers.

To highlight this quickly for you, at the back of the brief is a summary of our occasional and continuing education teachers who have been organized so far by OSSTF. The numbers are there quite clearly. You can see the units that are certified and those that are still awaiting certification but whose applications are before the labour board.

At this point I would like to defer to Mr. Buchanan to take you through the next part of the brief.

Mr. Buchanan: I would like to share with you some of the concerns the federation has experienced in its organizing efforts and in obtaining recognition and collective bargaining rights for our fellow teachers.

On page 2 of our submission we would like to help clarify some of the terms that some of you may not be very familiar with. We currently negotiate under Bill 100, or the School Boards and Teachers Collective Negotiations Act. However, that act does not recognize occasional teachers. Some of you may be more familiar with the term "supply teachers." They are not recognized under that legislation.

There is also the status of continuing education teachers. They are the teachers who teach night school, summer school and some adult day school programs, and their status is also somewhat in question. It has been the federation's position that the occasional and the continuing education teachers should have recognition under the School Boards and Teachers Collective Negotiations Act to negotiate so there would be some continuity there.

That is the present situation.

We have attempted to address this in negotiations, and under the section "History of OSSTF Involvement in Representing and Organizing Occasional and Continuing Education Teachers" it is very clearly spelled out for you. I will not bore you by reading through it. We have tried to address the concerns of these teachers, either in our current negotiations with the regular day school teachers or individually under various other methods.

We would like to point out very clearly that it is the position of the Ontario Secondary School Teachers' Federation that all teachers teaching courses, full-time or part-time, which are eligible for Ministry of Education grants should be covered by the School Boards and Teachers Collective Negotiations Act.

To assist us in this, as the president and I have mentioned, we went before the Ontario Labour Relations Board and obtained a number of decisions by Messrs. Furness and Gray. They have ruled in favour of the federation's position that continuing education teachers should be under the parameters of the School Boards and Teachers Collective Negotiations Act. However, these decisions have been appealed by school boards and will be going before the courts. As you know, this all takes valuable time. These teachers have signed membership cards in OSSTF for recognition and collective bargaining rights. We believe that it is important that first-contract legislation relate equally to these teachers.

The interface between the School Boards and Teachers Collective Negotiations Act and the Labour Relations Act is on page 4. We believe that if there are no changes to Bill 100, there must be some reference in the labour act to ensure that first-contract provisions will apply equally to Bill 100 so that there will be an interface. We suggest that the committee consider an amendment to the Labour Relations Act to ensure that the exemption clause, clause 2(f), be amended to ensure that the same rights, duties, obligations, responsibilities and so on apply to Bill 100 to protect the interests of these teachers.

"Frustration and Delays" on page 5 will give you an idea of the concerns we have and the delays we have experienced. For example, OSSTF has filed with the Ontario Labour Relations Board 17 occasional-teacher-unit applications for certification. As of March 1, 1986, six applications have been approved by the board and 11 applications are still pending. Among the 11 pending applications, eight were filed with the board during the 1984 year. The application for the city of York occasional teachers, for example, was filed April 27, 1984. We believe this delay is unconscionable. It is frustrating. The rights of these members have not been served.

There are also the 18 applications for certification for the summer and night school teachers that I mentioned. Everything is being delayed here also because of the challenge in the courts regarding where these teachers should be placed.

A further example of what is happening in Haldimand is on page 6. Although they have certification--and they received it fairly early on--the school board is not prepared at this time--perhaps Mr. Ishibashi would like to comment a little later regarding the delay and frustration in achieving a first collective agreement for these teachers and that now, one and a half years after the fact, they have received recognition as a bargaining unit. We believe that is not correct.

General recommendations are that the federation proposes, first, that the arbitration process commence within 30 days of receiving a conciliator's no-board report and that we must have open and unrestrained access to arbitration to resolve the problems I have outlined, and second, that either the bargaining unit or the employer may apply for arbitration of a first collective agreement after the conciliation process has been completed. We believe this would speed up the process and would be fair to the process.

Mr. Forster: Looking at page 8 and following from what Mr. Buchanan has said, we suggest under subsection 40a(2) that the process of automatic access follow the fact that the minister has not considered it advisable in a no-board situation or there has been a report of a conciliation board and that either party would have the right to apply; that once the application had been made, either the labour relations board would proceed to settle or the parties would agree to a board of arbitration that would make such a settlement.

Mr. Taylor: On a matter of procedure, Mr. Chairman: I gather we are now getting into the recommendations on sections of the bill. Would it be appropriate to deal with questions on those sections as we go through them or do you want to wait?

Mr. Chairman: It is up to the committee. Does it matter to you whether we deal with them as we go through this?

Mr. Albert: I do not think it will take us much more than five minutes to highlight our changes. Maybe then we could go to wherever you have questions.

Mr. Chairman: Carry on.

Mr. Forster: Turning to page 9, the present wording of subsection 40a(7) gives the board of arbitration the power to determine its own procedure and give full opportunity to the parties to present their evidence. We suggest that this be extended somewhat to give it the powers under subsection 44(8) of the Ontario Labour Relations Act, which would include the power to subpoena and administer oaths.

On page 10, all the material there fits in with what is proposed for subsection 40a(2) with regard to the automatic access, except subsection 40a(12), which is the requirement to reinstate employees and so on. We look for some language there that would prevent recriminations. We suggest the way to do that would be to give employees who are not rehired the right to grieve the discharge.

The last of these amendments is on page 11. With regard to subsection 40a(15), we suggest a minor phrase to clarify it, knowing what trouble or fun lawyers can have with language and the problems that can arise from it. Rather than say, "whether the parties have made reasonable efforts..." we suggest, to make it clear, that the arbitrating of the settlement can take into account the conduct of one or both of the parties. The way we read clause 40a(15)(b), we understand this would give the arbitrators the right to look at interunion agreements as well as other comparisons. If not, we suggest some strengthening of the language.

That is the full extent of the suggested amendments.

Mr. Chairman: We will proceed with some general questions on the brief and then work into the amendments. First, are there any questions on the general part of the brief?

Mr. Gillies: I appreciate your presentation today. I will direct my first question to you and then to our ministry representative. Have you had any indication from the government on whether it proposes to recognize these part-time teachers under either Bill 100 or the OLRA, or whether it proposes to do anything with them?

Mr. Albert: That is a good question. Mr. Forster and I have met with the Minister of Labour (Mr. Wrye) as well as the Minister of Education (Mr. Conway) from time to time. We have raised that very question with both of them. Their response has been that they believe it will take a joint meeting of both ministries. There is some openness to including the definition, if you like, expanding the definition of the teacher as outlined in Bill 100.

As you know, Professor Matthews made that recommendation in 1979. It was the frustration of never seeing that suggestion incorporated into Bill 100 that finally motivated our organization to take the organizing route under the provisions of the Ontario Labour Relations Act.

I am not as hopeful a young man as I once was in terms of thinking that, simply by coming and asking for something, you get it. We have gone out in a very deliberate and aggressive fashion to organize these people, because we believe they deserve to have full collective bargaining rights and we are prepared to represent them.

Mr. Taylor: The situation is still fluid.

Mr. Albert: It is still fluid, except that now at least we have extended the effort to the extent that we are negotiating for six of the units. We are being held up only because of all the intervention at this stage on the other 11 we believe will fall into place as certified bargaining units in a very short time. However, the situation for occasional teachers in summer and night schools is in a little more flux.

Mrs. Baumann: With respect to this legislation, one of the reasons we are suggesting that hook-in to the School Boards and Teachers Collective Negotiations Act is our adult day school teachers in Ottawa, for example, where we bargain under Bill 100. The arbitrator in the decision that said they should be bargaining under the School Boards and Teachers Collective Negotiations Act threw in a new wrinkle and suggested they bargain as a distinct unit under that act.

While we eventually achieved a first contract there, it was after a great length of time and considerable effort. We can anticipate that, even if we are able to incorporate the kinds of teachers we are talking about under the School Boards and Teachers Negotiations Act, which is not yet clear, we might need first-contract provision as a last resort.

Mr. Gillies: It is an intriguing problem. Theoretically, when we have legislation before us to amend an act, we can amend any aspect. A majority of the members of this committee could move the amendment you have suggested. The question in my mind is, would we be wise to do so when it might derail something else Mr. Conway has in mind that, for all we know, may be better for you? I do not know enough about it to know whether it would be preferable for you to be under Bill 100 or under this.

Mr. Buchanan: You will be hearing a presentation from the Ontario Teachers' Federation, which will also be making a fairly similar type of request. After consideration, I am sure you can always ask and consult with the respective ministers about this direction. We feel it is a logical one that would be advantageous to those teachers.

Mr. Gillies: I have a couple of questions about amendments, Mr. Chairman, but I will defer if you want to do the general themes first.

Mr. Callahan: I want to get some clarity here. You have some occasional teachers who have successfully organized under the act under which full-time teachers organize.

Mr. Taylor: As a trade union.

Mr. Albert: No. Again, if you look at the last page attached to the report, the six units organized under the Labour Relations Act are all supply, substitute or occasional teachers.

Mr. Callahan: Maybe I have misread it, but I thought you got favourable decisions from the Ontario Labour Relations Board panels chaired by Furness and Gray. That was under the School Boards and Teachers Collective Negotiations Act. That is before the Divisional Court at the moment, is that right?

Mr. Forster: That is correct. That is with regard to continuing education teachers.

Mr. Callahan: Is that with reference to supply teachers?

Mr. Forster: No. That is in reference to teachers who are teaching at adult day school, say, or summer school and night school.

Mr. Callahan: Are they full-time?

Mr. Forster: They are full-time and part-time. There is a mixture.

Mr. Callahan: You say the others have been successful under the Ontario Labour Relations Act in being certified as a bargaining unit.

Mr. Albert: Six of them have.

Mr. Callahan: How did they manage that if subsection 2(f) is there? Oh, I see; they are not a teacher as defined in the School Boards and Teachers Collective Negotiations Act.

Mr. Albert: That is the definition.

Mr. Callahan: That is like being between a rock and a hard place.

Mr. Buchanan: You have it.

4:20 p.m.

Mr. Albert: The point about the reference to subsection 2(f)--we have certainly made this point to both the Minister of Labour and the Minister of Education, and we make it to this committee--is that there is still an opportunity to corral teachers under one piece of bargaining legislation. However, because the definition itself has been so narrowly focused for so long, the Ontario Public Service Employees Union has a couple of occasional teacher units that are certified under the labour relations board. The OSSTF has some, the Ontario Public School Teachers' Federation has one and the Ontario English Catholic Teachers' Association has several as well.

Essentially, to represent these teachers, because they are not under the bill that governs negotiations for the vast majority, we have had to go out, indicate their desire to be represented, which signing a card does, get the

certification and then begin the bargaining process under the Labour Relations Act, which was our only alternative. You cannot do those things under the legislation that governs the bargaining for day school teachers.

Mr. Taylor: You talk about the lawyers getting away with the meaning of words.

Mr. Callahan: They have been here already.

I gather part of the reason you are here is that Bill 65 would apply to those part-time teachers who were certified under the Labour Relations Act and that you people want that to be included in the School Boards and Teachers Collective Negotiations Act as well because it would not be available to you since you are specifically excluded under clause 2(f).

Mr. Albert: That is correct. The amendments proposed in Bill 65 will expedite our situation and the situations of other teacher federations that are trying to represent occasional teachers. At the same time, there are a number of other part-time teachers who will not benefit at all by this because they are caught under Bill 100 so far in terms of the rulings we have received from Furness and Gray.

Mr. Callahan: You have a matter before the courts. Perhaps that should be resolved before any changes are made.

Mr. Albert: If I could defer for a couple of minutes to Mr. Ishibashi, with respect to highlighting the paper he has brought, he can show you the kind of effort we make for 25 new members under the Labour Relations Act. Bob, would you quickly take people through that paper?

Mr. Ishibashi: I will take you quickly through it. On page 1 is a brief summary of what the district has gone through. On August 31, we did send notice to the board that we wished to negotiate a collective agreement. On page 2 is a list of our meeting dates. We have met eight times up to this point. We have gone through conciliation and mediation.

Mr. Callahan: I am sorry. Are you at appendix A?

Mr. Ishibashi: No. I am in the other brief. Page 3 contains a list of the items that are still outstanding or in dispute. Some of these have been talked about with the Haldimand Board of Education and the teachers, and some of them have had no reply at all. We have agreed to a number of items, some of them already contained in the Labour Relations Act, but some time lines may still be outstanding.

The main item of frustration we have had is that the board has in most cases been unwilling to modify its salary offer to our teachers. The offer they gave us on October 17 was \$72.80 for a qualified secondary schoolteacher and \$62.40 for a qualified elementary schoolteacher for supply teaching in the secondary schools. The \$72.80 represents a 30.5 per cent decrease from what they would have received at that time. The \$62.40 represents a 40.5 per cent decrease from what they would have received at that time.

During our mediation session in August, the board did offer as a package a three-year freeze at the 1984-85 rates of \$104.86. Since that time, the rate for supply teachers has gone to \$109.58. The teacher request is essentially what has been in the teachers' collective agreement for a number of years.

On the next page are the pay scales for an occasional teacher for the past 10 years, from 1976 to 1986. The second-last page contains an article that is in the regular teachers' collective agreement regarding supply teachers; that supply teachers will be called if the principal is notified before 7:30 a.m. This article has been in the collective agreement since 1978.

The last page of the presentation contains an article regarding supply teacher pays, and this article has been in the regular teachers' collective agreement since 1976. It says a supply teacher will be paid one two-hundredth of a minimum category 1 per day. This article is still in the 1985-86 collective agreement and is in effect. It therefore raises the supply teacher pay per day to \$109.58.

Mr. Chairman: That is how the rate is arrived at.

Mr. Ishibashi: Correct.

Mr. Albert: The pay is determined according to the Bill 100 collective agreement. All the other terms and conditions of employment on most agreements are covered under the Ontario Labour Relations Act.

Mr. Callahan: Does that pay, times the number of days that an ordinary teacher would be paid, work out to more or less than that wage?

Mr. Albert: The one two-hundredth of a minimum qualification grid is based on the regular day school rates.

Mr. Callahan: If a supply teacher were to teach the number of days that a full-time teacher would teach for a full year, under some extraordinary circumstances, would the supply teacher wind up with the same pay as a full-time teacher?

Mr. Albert: Yes. The supply teacher would get the same as a full-time teacher at the lowest end of the experience grid.

Mr. Buchanan: In the one and a half years since they have been organized into a bargaining unit and the Ontario Labour Relations Board has granted certification, we have still not achieved a collective agreement for this group of teachers. We believe that is not correct. An amended version of Bill 65 would be very beneficial to these teachers and others who face similar situations. Of the six bargaining units that we had certified, we have not yet been able to achieve a collective agreement for any of them.

Mr. Callahan: Would you see the introduction of first-contract legislation avoiding that horrendous, painstaking decision that sometimes has to be made by the Minister of Education to legislate teachers back to work in a first-contract situation?

Mr. Albert: The only way these people who are awaiting a collective agreement are ever going to get that collective agreement now is to take strike action. They tend to be part-time workers and they are very loath to go on strike, as you can appreciate. Certainly, that would be one of the positive aspects of the bill; it would avoid first-contract disputes.

Mr. Taylor: That is an anomalous situation. It strikes me as strange. I can appreciate the intellectual challenge this type of a thing offers, but it is an aberration. Would you not agree?

Mr. Albert: The situation from the school boards' perspective is simply that they do not want to recognize an organization representing these people--

Mr. Taylor: Who are really a pool of prospective workers.

Mr. Albert: Absolutely.

Mr. Taylor: They do not have jobs until somebody is absent from the job and they come in.

Mr. Albert: It is a source of cheaper labour for school boards, and they are very loath to have to deal with them the same way they do with the five affiliates when we bargain for regular day school.

4:30 p.m.

Mr. Taylor: I am just picturing the situation, which is so different from the usual situation we deal with and the situation contemplated by this legislation. Presumably, that is why you are here, to ensure that it would be covered by any legislation that is passed.

Mr. Albert: Absolutely, and it only covers a minority of our total membership now. As your comments suggest, however, it is a potential pool of thousands of teachers for all five affiliates of the teacher federations of Ontario.

Mr. Taylor: What percentage of that pool would be utilized on a daily basis? Do you have any idea?

Mr. Forster: Most school boards put aside about four per cent of their salary budgets for supply teachers in the course of the year. In some years, that is a general figure in their budgeting processes. I presume they have worked out an average.

Mr. Taylor: That is for a board, but then you have a pool. Does the pool extend beyond a single board's jurisdiction?

Mr. Albert: Jim has referred only to supply teachers. Of course, the summer-school and night-school programs are quite extensive. In many jurisdictions, they probably rival the day-school program. Again, the potential there is probably much closer to the 40 or 50 per cent range of the day-school programs.

Mr. Taylor: That is what I was wondering. It would have to be.

Mr. Chairman: Are not many of those the same people?

Mr. Albert: In some cases they are; that is quite correct. It might be people who teach only a half timetable in day school or they may have a full timetable. It will depend on the area. For instance, in Metropolitan Toronto, where there are a number of well-trained people who cannot get full-time employment in teaching, many of these people have only that avenue. Recently, we have found that the part-time avenues are where most of the graduates from faculties of education begin their teaching careers. You may have one night-school course on Monday nights, and then not have anything until summer school, with some supply teaching along the way in between.

Increasingly, these seem to be the avenues to get into full-time teaching. Ruth wanted to add something.

Mrs. Baumann: I want to comment about the occasional teachers in particular and the anomalies. At this time, under the School Boards and Teachers Collective Negotiations Act, the occasional teachers clearly are not covered. It is arguable about the night-school and summer-school teachers and it is going to be argued in the Divisional Court. With the occasional teachers, there is a pool of potential employees. It is similar to the construction industry and other parts of the noneducational world where there would be a hiring hall situation. There would be a list of people who could be called as work became available, who would be unionized and who would be covered by a collective agreement when they were working.

It is very difficult to talk about the number of people on those lists. As we have been organizing, we have found hundreds of names of people appearing on lists when, as far as we have been able to figure out, there might be a couple of dozen who are actively being used. People have been on lists for years and have never said yes when they are called. Once we get collective agreements in place and people are working, particularly those who see this as a way of getting into teaching in a time of declining enrolment, we shall find we have a more stable and smaller pool of occasional teachers.

Mr. Taylor: That is what I was wondering. What is the size of the pool and what is the number of teachers within that pool who are actually utilized?

Mrs. Baumann: The pool is very deceptive right now because the pool is the list that the school board gives the Ontario Labour Relations Board. We occasionally can challenge some of the names if we know they have not worked in the last year, but that is difficult information for us to get.

Mr. Buchanan: If we were able to achieve a collective agreement for these people, we could deal with some of these problems you are dealing with in contract language. The problem that we are facing is the reluctance of school boards yet to recognize us and to recognize them as a legitimate bargaining unit, although the labour board has granted that. That is why we welcome Bill 65 because we hope it will be a catalyst so we can represent the interests of these teachers, which currently we are unable to do.

Mr. Pierce: I have been following the line of questioning in respect to the use of supply teachers as a cheaper way for the school boards to go, but a teacher has to be off work in order to use a supply teacher. Is that not right?

Mr. Albert: That is correct.

Mr. Pierce: The board is paying the teacher who is off work as well as the supply teacher who is coming on, so it is not cheaper to use a supply teacher. There has to be a vacancy there, and the vacancy is predicated only on the fact that the teacher is off work for whatever reason--sickness, maternity leave or whatever. It is not cheaper for a board to use a supply teacher.

Mr. Albert: In terms of the total grants that are transferred to school boards, consideration is given to those sorts of things. Every employee of the school board is entitled to two days per month. A custodian gets two

days times 12 months, that is, 24 days' sick leave. Teachers get 10 months, and thus 20 days' sick leave.

I dare say the last time I saw statistics on this, in the Wyatt Co. report in about 1978, of all school employees, teachers used those days the least.

Mr. Taylor: Because they came sick sufficiently--the frequency to fill the allocation of time available for their absence--it sounds like Parkinson or something?

Mr. Albert: Yes.

There is another thing. Many of the reasons that teachers are absent from a classroom are educational. An English teacher may take a group to the Stratford theatre. A science teacher may take a group to the Ontario Science Centre. These are educational reasons for which supply teachers are brought in to cover those absences. Supply teachers are used for a variety of reasons.

Mrs. Baumann: Our comment about cheap versus expensive had to do with the difficulties we are having in a place like Haldimand, where clearly the board is resisting settling a first contract even though we are not asking for anything very much more, monetarily, than what is there right now. I think the desire of the school board, like that of many employers, is to keep its options open. When supply teachers are not organized and not covered by a collective agreement, if the board gets into tight budget times it can unilaterally decide that it will cut the supply teachers' rate of pay by 30 per cent.

It is not a question of its being cheaper than having regular teachers or cheaper than not having people away. It is a question of keeping the board's option to spend more or less money in its own hands rather than as a matter for collective bargaining.

Mr. Callahan: You are aware that Bill 65 excludes the construction industry. I do not know why that is so. Maybe I can ask our staff why that is so. You have used the analogy that the supply teachers are somewhat akin to the construction industry. Why is the construction industry excluded?

Mr. Failes: There were a number of reasons. This was brought up yesterday by Mr. Gillies. It is clear that the industrial, commercial and institutional sector, which bargains province-wide, is not suitable. I do not think there is any question about that.

The question was why other sectors were excluded, and I mentioned a couple of reasons yesterday. Generally, labour relations in the construction industry are very different from those that we experience in the organized sector outside the construction industry. There are a couple of things.

Mr. Callahan: Excuse me. Is that because of its seasonality?

Mr. Failes: It is because of the nature of the work and because of the way collective bargaining and wage patterns have developed historically in the construction industry. For example, it is very common to find pattern bargaining. In a geographic area, an informal wage structure develops, and although there may be only a percentage of people actually under collective agreements there, you will find that the majority of construction workers in that area are being paid the same wage. It is simply the agreed-upon wage in the area.

Another difference is the statutory mechanism for accreditation, which allows employers' groups to bargain collectively with groups of unions in various geographical areas, and there are a number of other features that make it a lot different. I do not know whether the committee really wants to go into it in great detail now. I do not see a lot of analogy between the teachers and the construction industry.

4:40 p.m.

Mr. Callahan: I asked it because they had raised it as being analogous. I thought there must be a very good reason for their being excluded from the bill to begin with, and if that was the case, perhaps that is an answer to what has been put forward.

Mr. Gillies: By the way, I am still trying to get some sort of response from the construction people I met with about where they stand on it now. I have not done so at this point, but I will certainly let you know as soon as I have.

I have two quick questions about your amendments, if I might.

Mr. Chairman: Are there any other general questions before we move into the amendments now? Okay. Go ahead.

Mr. Gillies: I am trying to follow your typed amendment. On subsection 7, on the bottom line where it says "section 8--

Mr. Callahan: What page are you on?

Mr. Gillies: I am sorry. I am on page 9. It says, "section 8...the board." Should that read "section 108"? I am trying to relate it to the section in the act.

Mr. Foster: Yes. That is correct.

Mr. Gillies: Okay.

Mr. Taylor : It was obvious to the rest of us.

Mr. Foster: It still has not changed since Bill 100, has it?

Mr. Gillies: Nothing is obvious to me.

The question I should probably ask the ministry representative then is, was there any question in the mind of the ministry or in your mind that the arbitrator in this case would have the same powers as those under subsection 44(8)?

Mr. Failes: You will find that our amendment simply refers to subsection 44(8) amongst other powers. That was an oversight in the original draft and that has been corrected by the ministry's proposed amendments.

Mr. Gillies: That is done then.

I also want to ask about subsection 40a(12) where you are recommending that "employees who are not rehired" must "automatically have the right to grieve their discharge." Without it being explicit by way of amendment, is it the intention of the ministry that if employees so agree to it they have the right?

Mr. Failes: I am not quite sure what the teachers' amendment anticipates. Would they grieve too and under what form? The ministry's position in the bill is that the employer has to rehire these people in reverse order of seniority unless there is some other agreement and unless the board directs otherwise. If you do not comply with that, then your recourse is to the board. I am not sure what the teachers have anticipated by this.

Mr. Forster: Where you are coming from is what we are looking at, that there be some form of recourse if the person is not rehired. You are saying it is to the labour relations board?

Mr. Failes: Yes.

Mr. Forster: Or whatever board of arbitration.

Mr. Failes: Perhaps the word "grieves" is not the right word there.

Mr. Gillies: I seem to be in touch with what recourse they have.

Mr. Forster: We were concerned about the recourse in case of nonhiring, and in subsection 12 it was not clear what recourse there would be, if any.

Mr. Failes: There are provisions in the Labour Relations Act which allow enforcement of that act if there is any violation of it. This would mean that if an employer did not comply, he would be in violation of the act.

Mr. Gillies: Therefore, it is elsewhere in the act and an amendment to this subsection should not be required.

Mr. Buchanan: May I ask this question for clarification? When we were developing our brief, which was several weeks ago now, we thought it was conceivable that during an organizing drive, some action could have been taken on an employee of the board at that time before certification that he was fired, or there may have been some activity in which the employer filed a civil charge against someone with respect to perceived harassment or violence in the organizing drive.

A recent decision has been made on that in the last little while, but that was some of the thought behind this as well. All of these employees, even prior to the certification of union activities being granted, would also have recourse to some type of action to ensure they were reinstated. I am wondering whether your amendments or your thoughts on this would also cover that situation.

Mr. Callahan: Yes. Subsection 11 refers only to the bargaining unit. He is talking about employees who have not succeeded in becoming part of the bargaining unit because they are dealt with prior to certification.

Mr. Failes: I think the act in general anticipates this. The act prohibits any action by an employer against employees, including dismissal or demotion--as we heard from the last delegation--regardless of whether they are in a bargaining unit, if that action was taken on the basis of their union activities or union membership. In most cases, your recourse is to the Ontario Labour Relations Board and it will reinstate an employee who has been adversely affected. Does that answer your concern?

Mr. Buchanan: We thought this would speed that up, barring that particular suggestion. It is more expeditious.

Mr. Failes: Who would you be bringing your complaint before?

Mr. Buchanan: At this time, the only body would be the Ontario Labour Relations Board.

Mr. Failes: It would already have jurisdiction, though, to consider, for instance, if the employer fired one of these employees during the organizing drive, even before there was a unit certified. That employee already has an existing right to bring a complaint before the labour relations board. This would really not add anything in that sense, unless I have misunderstood your position.

Mr. Buchanan: We have made the point that we wanted to make.

Mr. Chairman: Are there any other comments on the proposed amendments?

Mr. Albert: Thank you. I appreciate sitting through the committee hearings. It is a long ordeal. We are new under the Labour Relations Act, but we are eager. We want to do the best we can to learn the ins and outs. We very sincerely appreciate the direction of Bill 65 and we wish you well in your deliberations on this piece of legislation.

Mr. Chairman: Mr. Albert, we know you are not new in making presentations before legislative committees. We appreciate your presentation this afternoon.

The committee adjourned at 4:47 p.m.

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Government
Publications

STANDING COMMITTEE ON RESOURCES DEVELOPMENT
LABOUR RELATIONS AMENDMENT ACT
THURSDAY, MARCH 27, 1986
Morning Sitting



STANDING COMMITTEE ON RESOURCES DEVELOPMENT

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Substitution:

Gillies, P. A. (Brantford PC) for Mr. Stevenson

Also taking part:

Polisnelli, C., Parliamentary Assistant to the Minister of Labour
(Yorkview L)

Clerk: Decker, T.

Staff:

Madisso, M., Research Officer, Legislative Research Service

Witnesses:

From the Canadian Union of Public Employees, Ontario Division:

Nicholson, L., President

Sheehan, B., Legal Counsel

Kovacs, L., First Vice-President

O'Connor, T.

From the Ministry of Labour:

Failes, M., Policy Analyst, Labour Policy and Programs

From the Arlington Crane Service Ltd.:

Foran, D., Secretary-Treasurer

From the Office and Professional Employees International Union:

Beauregard, G., Secretary-Treasurer

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Thursday, March 27, 1986

The committee met at 10:13 a.m. in committee room 2.

LABOUR RELATIONS AMENDMENT ACT
(continued)

Consideration of Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: We have before us this morning the Canadian Union of Public Employees.

This committee has been charged with responsibility for holding public hearings on Bill 65, first-contract legislation, debating it clause by clause and referring it back to the Legislature for whatever. We are now part-way through that process. By the end of next week, we hope to complete the clause-by-clause debate, and that will be the conclusion of our hearings until after the Legislature comes back. If we are not finished, we will finish it at that point in late April.

This morning we have Lucie Nicholson from CUPE. Lucie, I ask you to introduce your delegation.

CANADIAN UNION OF PUBLIC EMPLOYEES

Ms. Nicholson: Thank you, Mr. Chairman. On my far right is Les Kovacsí, who is first vice-president of our division in Ontario and the president of our municipal workers in Toronto, Local 43. Next to me on my right is our legal counsel, Brian Sheehan, who works from our Ottawa base. On my left is the secretary-treasurer of our Ontario division, Terry O'Connor.

For those of you who do not know my union, we are the largest Canadian union. We are a union that is constantly organizing. Our members cover a wide spectrum from Ontario Hydro to the Canadian Broadcasting Corp., to municipalities, to the educational field and to health care. I am sure I miss a lot of them when I say that. Within the health care system, we also organize nurses for the aged. In that area, we have a history of intransigent employers, so we know what it is like to look for a first collective agreement.

My union sincerely believes contracts should be negotiated. That is why we form a union. We join a union to bargain collectively with our employers. We believe negotiating with your employer is the best and fairest way.

The similarity between the recent strikes at Eaton's and the Canadian Imperial Bank of Commerce and the infamous strikes in the 1930s when unions had to fight to be recognized by the employers is very significant. The strikes in the 1930s often had a very significant social cost to the people striking. With the introduction of collective bargaining legislation, that was given to the unions as a tradeoff for other rights they had; that included the right to strike at will. Recently, strikes for recognition have been outlawed, and yet we see that employers are using the bargaining table as their tool to refuse to recognize the unions.

If we do not have automatic access, these sophisticated employers will spend all their time in an attempt not to be caught by this legislation. With automatic access, there would be an incentive to bargain. We sincerely believe there would be incentive on both sides to bargain a collective agreement because both parties would realize there would be a collective agreement at the end. A collective agreement that is negotiated is much preferable to one that is imposed.

Having said that, we reiterate our opening statement. We sincerely believe in negotiating collective agreements. Through our legal counsel, we are going to address subsections 40a(2) and (15) of the act as set out in section 1 of the bill. If at any time there are questions while Mr. Sheenan is speaking, please feel free to have any of your committee ask them.

Mr. Sheenan: I will not bore you by reading my brief, but I will alert you to two typographical errors that appear. Both are in the same place on page 9. It should read, "Other problems in interpreting subsection 2." We were a little voluminous with our wording with respect to the word "interpreting."

Let me deal in more detail with what Ms. Nicholson touched on as to what type of evil this bill is designed to deal with. It must be understood that we are dealing with a very limited situation. We are dealing only with a situation of an employer who refuses to recognize a union. This has happened very infrequently over the past couple of years, but there have been a number of situations where it has happened. The Eaton's and CIBC cases are the classic examples.

10:20 a.m.

Why we think automatic access is crucial can be witnessed by the CIBC situation. The Canada Labour Relations Board has the power to enforce a first contract, but the parties have to satisfy a threshold test. A threshold test is very much like a bad-faith bargaining test. It is interesting to note that the union involved had to go through 17 days of hearings just to satisfy that test. In that case, the union was fortunate to have the backing of the Canadian Labour Congress. A large number of small unions would not be as fortunate.

Ms. E. J. Smith: To satisfy the test that it is the appropriate union?

Mr. Sheenan: No.

Ms. E. J. Smith: Which test then?

Mr. Sheenan: To satisfy the bad-faith bargaining test.

Ms. E. J. Smith: Yes. Bad-faith bargaining on the basis that it would--

Mr. Sheenan: On the basis that the employer has bargained in bad faith. Therefore, the board should impose--

Ms. E. J. Smith: Just on the general category?

Mr. Sheehan: Yes. If we have a threshold test, we are going to get into situations of a great deal of costs for unions and both sides. We are also going to have delays. I compliment the legislation as drafted because it puts fairly strict time limits on the board in dealing with the matter. I noticed the minister, when he was here, suggested there may be some problems with adhering to the 30-day time limit within which the board has to consider a matter.

It seems to me that with the reality of labour relations law, and knowing a lot of lawyers on the bar, it would be very difficult to hear such a case in 30 days. It will be extremely difficult. It will be interesting to see how that arises.

The fact is that we are going to get into a number of situations where delays can occur. The union or one of the parties will apply and say the threshold test in clause 40a(2)(b) has been met. The employer has done such and such under clause 40a(2)(b). The board looks into the matter and it has 30 days to reply. The board can say: "This is not the proper time. Send it back." The union can come back and the board can again say: "This is not the proper time. Send it back." There is no guarantee that when the board looks at the matter, there will be a settlement within 30 days. We might have people on strike and in difficult situations for long periods, much like the Eaton's and the Canadian Imperial Bank of Commerce situations.

If we have a threshold test, if we have some sort of test, we will have situations where counsel for employers will try to make creative arguments to suggest that the employers have not been caught by that test. That is all you will get. Employers will direct their energies to making sure they do not satisfy that test. On the other hand, if there is automatic access, the parties know that a collective agreement will inevitably come down. There can be no fooling around. They will say to themselves, "Let us negotiate this before it occurs." I understand there might be a concern that--

Mr. Taylor: They might say, "Let us not bother negotiating."

Mr. Sheehan: I was going to address that.

To a certain extent, that spectre raises itself where people just say: "What the heck. Let us not negotiate. Let us wait." First, if automatic access is delayed for a certain period--nobody is saying it will come within the first week of a party going on strike--if it is delayed for a certain period, nobody will want to go on strike for four or five months just to get an arbitrated agreement. The history of bargaining is that most strikes are settled within days. Only in the very rare situation will the parties resort to this legislation. Every union will not say, "We can have collective bargaining." Unions will want to use the right to strike and will use the right to strike. There is no doubt about that.

Mr. Taylor: Then is the right to strike not a stronger incentive than the subjection to arbitration?

Mr. Sheehan: It is, but--

Mr. Taylor: As I heard it presented, the motivation is that if you have this mandated arbitration hovering over you, then you have an incentive to negotiate a deal. You already have the tool of the strike. There is that element. Now I am trying to balance which is the strongest motivator, the strike or the mandated arbitration. Do you need both?

Mr. Sheehan: I think you do need both. In the majority of situations, ordinary collective bargaining will work. There is no doubt about it. It has worked and it will work. We will get agreements in 90 to 95 per cent of situations. It is only to deal with the situation where the employer refuses to recognize the union. It gets into sophisticated bargaining tactics. He says, "I am going to give you A, but I am not going to give you B." If the union does not have B, it is dead in the water. But the employer says, "No, I am not going to give in on that," for whatever reason. It might be a reasonable economic reason. It might be, "I am not going to give in on seniority." The employer will hold fast to that, knowing the union is very weak.

However, if you had automatic access, the employer could not take part in those tactics. The employer would know: "Wait a minute. Five months down the road there is going to be an agreement. Why go through this fruitless effort to hold to this dumb bargaining position?"

Mr. Taylor: You are assuming that the board will impose that as a standard clause in any contract.

Mr. Sheehan: Pretty well.

Let me deal with subsection 40a(2) itself. I know you have had some discussions, through the United Steelworkers of America and through the deputy minister's presentations, of what this threshold test means. There has been much confusion about whether the threshold test means something more than a bad-faith bargaining test. I think it is accepted even by the deputy minister that if it simply means a bad-faith bargaining test, it is going to be a hollow test because unions will never be able to satisfy it. If you simply want a bad-faith bargaining test, all you have to do is to amend section 15 and section 39 to give the board the existing remedial power to impose a first contract.

This legislation, from the deputy minister's point of view, must say something more than a bad-faith bargaining test. The deputy minister has admitted that clauses 40a(2)(a) and (c) are section 15 under the Ontario Labour Relations Act. They are the bad-faith bargaining test; he admitted as much. Clause 40a(2)(d) is what is referred to as a basket clause.

Mr. Taylor: With respect, we had a different view on that yesterday. I think you mentioned clauses 40a(2)(a) and (c) as being the bad faith test, and there was an indication that they might be elements of a bad faith test but not necessarily a bad faith test themselves. In other words, there was some indication that it could take more than one element to establish the conclusion of bad faith. It might be that with this, one element of bad faith would be sufficient in itself. I do not know whether that is an argument of significance or not.

Mr. Mackenzie: Inasmuch as Mr. Taylor has interjected that, you should also know that we had it pretty clearly defined yesterday by one of the major business groups, the Canadian Manufacturers' Association, that in effect it agreed--that is not the way it was put--that there is bad faith in several of these sections, and this is exactly the point being made by all the unions. I am not sure it is the first business group that does not agree with that as well.

This does not mean the CMA wants it improved. It would probably leave it that way, but it has agreed that the current bill has certainly very strong bad-faith components.

Mr. Sheehan: If you read section 15, which is the bad-faith provision of the Ontario Labour Relations Act, clauses 40a(2)(a) and (c) are it. The deputy minister cited that fact in his presentation to this committee. He essentially said that.

Mr. Taylor: That is generally accepted. At least that is the impression we have had.

Mr. Chairman: Mr. Failes wants to make a comment here.

Mr. Failes: Yes. To clarify what the deputy said or what he meant, clauses 40a(2)(a) and (c) contain the words found in section 15, the two aspects of section 15, but they do not necessarily amount to the same test. In fact, they would not because, as you point out in your brief, the essential element in a section 15 challenge is a desire to avoid reaching a collective agreement; it is anti-union animus. That is not required here at all. This is no longer an unfair labour practice section. We have amended that section.

10:30 a.m.

Mr. Sheehan: Mr. Failes, I agree, but in his presentation the deputy minister focused the lack of intent on clause 40a(2)(b). All I am saying is that he admitted that clauses 40a(2)(a) and (c) were the existing bad-faith test. He then went on to say, "But we have clause 40a(2)(b), which does not require intent." That was the focus of his discussion. I can refer to the exact pages of his presentation if you want.

Mr. Failes: Please do.

Mr. Sheehan: Okay. It might take some time.

Mr. Chairman: I am not sure we need to go back and read through the comments of the deputy minister.

Mr. Callahan: To go back to that, I think the comment was made by Mr. Taylor that clauses 40a(2)(a) and (c) could be either/or, whereas in the past I gather there was some difficulty in establishing bad faith. This legislation is really intended for those factual situations where it is pretty obvious that the employer is trying to avoid the union coming in.

One would think that since they are now separated into clauses (a) and (c), you could forget about (a), because that might be difficult to establish except in the most blatant cases. However, you could go down to (c)--you still have (b)--and say, "the failure of the respondent to make reasonable efforts to conclude a collective agreement." If the proceedings went on and on and nothing fruitful was happening, surely the reasonable test would be applied and under that clause alone you would be able to get access to arbitration.

Mr. Sheehan: We are not saying that this does not outline the bad-faith test; it does. We are saying, if all you want to do is give us a bad-faith test and the remedial power to impose a first-contract situation, do so. Do not give us whole new legislation. Just give us section 89 and this will be a hollow victory, because I point out that they have a bad-faith test and the power to enforce a first collective agreement in British Columbia, and it is never used.

Mr. Callahan: What I am suggesting is that there is bad faith, but there is more than bad faith here. It has been broadened in terms of access.

Mr. Sheehan: I refer to page R-19 of the deputy minister's presentation.

Mr. Taylor: The point I was trying to make is, you can call it bad faith if you like and that is the impression we have had. If you call it bad faith, under this it is easier to establish bad faith.

Mr. Callahan: That is right. You have a two-pronged attack. You are not stuck on bad faith in a single entity.

Ms. E. J. Smith: Mr. Chairman, on a point of order: I think to some extent what we are into now is what we should be doing in the resumé, because we are discussing other people's briefs rather than--

Mr. Gillies: We are into clause by clause among each other.

Mr. Chairman: Let us go back to Mr. Sheehan and let him complete his remarks.

Mr. Sheehan: For your own edification, I refer to page R-19 at the bottom and page R-20 of the deputy minister's presentation where he clearly suggests that clauses 40a(2)(a) and (c) are the bad-faith bargaining tests. At the bottom of R-20, you get his analysis of the key section, in his mind, clause 40a(2)(b). That is where he says we are going to something more. His view is we are going to a situation where we do not need intent.

In bad-faith bargaining, the general thought is you need an employer who says: "I am not going to recognize the union. I hate unions. That is it. I am not going to bargain." What the deputy minister is suggesting is that you will not need that type of action. With clause 40a(2)(b), you do not need to satisfy intent; you do not need to satisfy anti-union motive.

The problem with clause 40a(2)(b) in our view--and you heard Mr. Shell, a labour lawyer with the Steelworkers, put his position across, and we agree with his position--is that it is nothing more than a basic reassertion of the bad-faith test. In regard to this, I refer you to my brief and two quotations from the leading labour law book on Ontario Labour Relations Board practice. At the bottom of page 7 and the top of page 8, especially the underlined part, the authors, Sack and Mitchell, set out what constitutes bad-faith bargaining under section 15.

You will note the underlined part speaks pretty closely to what is defined in clause 40a(2)(b): "...and conduct which frustrates bargaining, although not to the point of evidencing an intention to escape the collective bargaining process, are prohibited by the section, but both types of conduct may arise in the same case and the board will determine if the totality of the conduct reveals a basic desire to avoid a collective agreement."

We are saying it is arguable that clause 40a(2)(b) does nothing more than set out the existing bad-faith test. It is not clear in the jurisprudence whether you need intent under section 15 as it exists. In a number of cases, the board has suggested intent can be implied by the action of the parties. If the party takes an uncompromising position with respect to a certain provision and refuses to go beyond that, the board has suggested that will give evidence of intent. Essentially what we are saying is, if the deputy minister is

seeking something more than a bad-faith test, he should say so, because we do not want to get into a situation where we end up at the board, have to fight for a year and are told this is simply bad-faith bargaining.

If it is the intention of the Ministry of Labour to make this something more than bad-faith bargaining, it should not fiddle around with words; do it.

I have another problem with the wording of clause 40a(2)(b). I want to deal with it in some detail. I do not really address it in my brief, but I have problems with the words "the uncompromising nature." I will give you an example. The nature of collective bargaining is that one party will take a position and effectively try to hold on to it for pretty well as long as it can. It is a situation in which parties resort to some form of economic power to get what they want, essentially, and there are always positions a person can take that the other party may view as uncompromising. That is the basic nature of collective bargaining: "I am not going to give in to you on a certain point."

When does the board decide a particular position adopted by a party has become uncompromising? For example, does it become uncompromising after two months? Does it become so after a week? Could the board say: "You have come after this point. The strike has been on for two months. I do not think it is uncompromising for the employer to suggest this particular provision be part of the collective agreement." Would you have to come back in six months and then does it become uncompromising? It suggests a discretion on this narrow term about what is uncompromising. I think the terminology in clause 40a(2)(b) should not be so technically worded that the board or the employers and their creative counsel can use it to suggest that the clause 40a(2)(b) test is not satisfied.

I also have problems with the restriction "without reasonable justification." The classic situation is an employer saying, for valid economic reasons, "I am not going to give in on a certain proposal." For example, a small employer might say, "I am not going to give in for this reason." If the only thing the board has to look to is "without reasonable justification," how is it going to decide that is not reasonable?

In his presentation, the deputy minister suggested the board can look at the economic situation of the employer and decide whether he should give in. That is all fine and nice, but you are going to have a situation in front of the Ontario Labour Relations Board where we will start to get the books of the employers in, we will start to get accountants in, and we are going to get into the situation where everybody is going to start defining what is a reasonable economic justification. I think the committee should look at that very closely.

I have some other problems with subsection 40a(2). They relate to the opening phrases before the setting out of the criteria and the use of the term "has been frustrated." In labour relations, "frustrated" is a term that is very rarely, if ever, used. The normal situation is an impasse, "bargaining has hit an impasse," but in labour relations terminology "impasse" means a strike. Our understanding of this legislation is that there is no requirement of a strike for this legislation to be imposed.

10:40 a.m.

We are concerned about this precondition of some sort of frustration. The board could say, "While the test has been satisfied, there has not been

frustration." You get this situation where the board might say, "we think the parties are meeting and there has been no frustration." The parties are meeting, going back and forth, but one party is saying, "I am adhering to position A and I am not going to give in." The board might say, "For the time being that is not frustration because collective bargaining is continuing."

The other problem is the reference to "because of." Once again, we are setting a precondition to finding that the subsection 2 tests have been met. The employer could say, "It is true that bargaining has been frustrated; it is not because of one of these things but because of something else." We get more litigation and more delay.

Our position is that subsection 2 as drafted is totally inadequate. If we are not going to get automatic access, we need something clear that suggests this is more than bad-faith bargaining. We need a situation without all these preconditions set out so the board can find that the test has been satisfied and impose a first-contract situation.

That is the end of my submission on subsection 2. Are there any questions on that?

Mr. Chairman: It would be best if you went ahead with the rest of your submission.

Mr. Taylor: He may not finish it otherwise.

Mr. Chairman: That is exactly right.

Mr. Sweeney: I will be brief with respect to subsection 15. Our only problem with subsection 15 is that for some reason this bill sets out criteria of factors that an arbitrator shall look to or may consider when deciding the terms and conditions of the collective agreement. The problem with setting out these criteria is we are setting up a situation where an employer or a union, either party, may say, "We have a collective agreement, but we do not think the arbitrator adhered to clause 15(a) so we are going to a judicial review." By setting up the criteria as such, the legislation clearly provides more opportunity for judicial review.

The other problem we have with subsection 15 is that it seems to imply some sort of fault mechanism in the job of the arbitrator to impose fair terms and conditions. The arbitrator is supposed to look at the prevailing practice, look at what has been suggested by the parties and decide what is fair and reasonable. Clause 15(a) seems to suggest that an arbitrator can say, "Look, employer, you have been intransigent and it is your fault, so we are going to give you a lousy contract." We are saying that is crazy. He could take the same position with the union. That is not the jurisdiction of an arbitrator. His jurisdiction is solely to impose a collective agreement. He cannot decide, "Wait a minute, the board has decided something else and I am going to impose a further penalty on you." It is only going to make the waters more murky.

In Ontario we have very esteemed arbitrators who for the last 20 years have been imposing and reaching collective agreements and settlements without any problem and without needing to refer to certain criteria in order to impose them. By setting out such criteria we are ruining their independence, limiting their independence, making them more susceptible to judicial review and again delaying the process.

That is our submission on subsection 15.

Mr. Chairman: Any questions from members of the committee? Mr. Gillies.

Mr. Gillies: Thank you for your presentation. It is very thought-provoking and, I hope, helpful. The first thing I would note to you is that we have had at least three, if not more, presentations that have all questioned clause (a). There is some concern on the part of committee members about whether that is an appropriate instruction to arbitrators. We will be looking at that in the clause-by-clause discussion.

Could you help us with respect to subsection 40a(2)? On page 5 of your brief you note that if there is to be a threshold test, short of automatic access, you would urge us to broaden and clarify that test. If you were redrafting with that in mind, could you make some specific recommendations to us on how you would do it?

Mr. Sheehan: On the understanding that there will be no automatic access and no time frame where you say a collective agreement is imposed within three months, I would probably set clause 40a(2)(a) as simply the bad-faith bargaining test; give the board the power to say that if bad-faith bargaining has been satisfied, it imposes a collective agreement.

On clause 40a(2)(b), I would attempt to suggest that it be if either party had failed to adopt fair and reasonable bargaining positions. By including the word "fair," the board will not be caught up simply in a debate about what is and is not economically reasonable. By including the word "fair," the board can look more into prevailing practice and into the context of labour relations. You might want to include that word in the labour relations context.

There is one thing that has to be recognized in this whole discussion. When a union is certified, that reality has to hit home to the employer. He cannot just continue on as is. There is a necessary reality that something will happen with respect to his wages, his security provisions or his discretion with respect to management decisions. Something has to happen; that is the reality. That is the whole nature of collective bargaining.

For the employer to come to you and say, "It is a reasonable economic justification for me to adhere to my existing practice," is craziness. The reality that there are some costs associated with the union being recognized has to be put in the legislation. You could put clause 40a(2)(b) in terms of fair and reasonable bargaining positions in a labour relations context; something such as that.

I might want to also include a phrase that suggests the board has a discretion if reasonable efforts have not been made to reach a collective agreement and a certain period has expired. It would be within the discretion of the board to decide when that has occurred. It would not be the automatic access situation because you could not be there three months. The board could decide: "Wait a minute. This has been going on for 12 months. This is craziness. In our minds, we should impose a first contract."

Ms. E. J. Smith: If you are not listing the time, is not "uncompromising" made to cover that?

Mr. Sheehan: No, because there is no guarantee that the board will hold that a position held by the employer is uncompromising. For example, if the union suggests a \$5 wage increase, an employer could simply say, "I am not

going to give into that." I would say that is not uncompromising at all; that is sensible. If a period of time had gone by with that situation, then the board could impose a collective agreement and more than likely the union would not get its \$5 increase. With the uncompromising nature, there is no guarantee.

Ms. E. J. Smith: Then that would be uncompromising on the side of the union.

Mr. Sheehan: To a certain extent it would be. Theoretically, the employer could bring home a collective agreement if he desired. As I said in the beginning of the presentation, we are dealing basically with a limited situation where employers have refused to recognize the union.

Ms. E. J. Smith: I hope you recognize both situations, that we can have uncompromising on two sides.

Mr. Sheehan: Yes. There is no doubt about it.

Ms. Nicholson: We readily recognize that.

10:50 a.m.

Mr. Sheehan: I do not think it has been hit home that there are costs to the unions involved in this. You can have a situation--and you have it in a lot of situations, especially for manufacturing concerns--where you have strong unions saying to a small employer: "We want this, this and this. We are going to go on strike and we are going to disrupt your operations until we get this, this and this." The employer says, "What the hell is going on?"

Ms. E. J. Smith: I would imagine there could be a little concern if, as you say, it were a big union and a small concern because if the small company goes under, the business is taken on by a major unionized company.

Mr. Sheehan: That is true.

Mr. Gillies: I wonder whether you can help me with another thing. We will see whether some of the legal beagles around here can help with this too. As I read subsection 40a(2) as it is now worded in the preconditions in clauses (a), (b), (c) or (d), the Ontario Labour Relations Board could make its decision on the basis of one of them; it does not say (a), (b), (c) and (d).

Mr. Callahan: That is right. It is disjunctive.

Mr. Gillies: You appreciate that with the preconditions you listed in your suggestion, basically the bad-faith bargaining test and a couple of other options, as long as it is "or," the board could hang its hat on bad-faith bargaining.

Mr. Sheehan: Precisely.

Mr. Gillies: That does not bother you.

Mr. Sheehan: No.

Mr. Gillies: As long as it is an option.

Mr. Sheehan: Yes. With bad-faith bargaining, if an employer is

intentionally saying, "I refuse to bargain," there is no doubt the board in that situation should have the power to force a collective agreement on that employer. We have no problem with the bad-faith bargaining test.

Mr. Gillies: As long as there are other options.

Mr. Sheehan: Precisely. If it is limited to a bad-faith bargaining test, our view is that the history of the British Columbia legislation and the history of the Canada Labour Relations Board legislation is that this will never be used. You are going to have protracted hearings and protracted debates as to what is bad-faith bargaining. Is there necessarily intent implied?

The deputy minister, quite rightly in his view, has suggested that subsection 40a(2) suggests something more; it suggests intent. He says we need something more than intent; we need the power of the board to make some determination that the positions become unreasonable. Our view is that clause 40a(2)(b) as drafted is inadequate to express his intention because 40a(2)(b) simply reasserts a bad-faith test. We are saying that if the Legislature wants something more than a bad-faith test, it should set it out so there can be no dispute down the road. If it is going to provide something more, it has to recognize the labour relations reality of what is occurring in bargaining. It has to hit home that the board will have the discretion to look in terms of the reality.

In a sense, if the board is restricted to making some determination as to what is reasonable in some sort of economic test, in an abstract situation, there might be problems. The employer can say, quite rightly, "This is not reasonable for me." Every employer in every situation, such as in the city of Toronto with Les Kovacs, can say, "This is not reasonable for us." There is justification for what he is saying, but there is justification for what Mr. Kovacs is saying. If it is limited to that debate, the board might not have enough discretion. If it can be hit home to the board, then if Mr. Kovacs is demanding a basic seniority clause, the board will know that every collective agreement has a basic seniority clause. Reasonable economic justification becomes invalid in that situation. We need more explicit language on that basis.

Mr. Mackenzie: Have you seen the amendments suggested by the United Steelworkers of America?

Mr. Sheehan: Yes, I have.

Mr. Mackenzie: I presume we will also get a set, although I do not know whether there will be any substantive difference, from the Ontario Federation of Labour when it is here next week. If we do not have the open access, do you have any particular difficulty with those amendments as suggested? That would be of interest.

Mr. Sheehan: I do not have difficulty per se on the proviso, on the understanding that we are not going to get open access. Our position is that we should have automatic access. If we are not going to get automatic access, which I would reiterate, we are going to be in a situation for about two years where we will have to figure out what is the actual value of this piece of legislation. We could draft a piece of legislation without automatic access and end up with it never being used, because it would be too difficult to satisfy. If we cannot get automatic access, the United Steelworkers of America's amendment goes pretty far towards reaching the kind of a solution that we see.

Mr. Callahan: One point was raised yesterday which I had not heard before; that is, the proposal that when you get to arbitration the committee chairman's expenses should be paid out of the consolidated revenue fund. We debated that back and forth as to whether it might not simply lengthen the process. If the parties saw no economic sanctions by way of that additional cost, they could protract the proceedings.

Mr. Sheehan: There is some validity to that position. By the same token, there is some validity to the position that, for small unions, the cost of arbitration is quite extensive and quite onerous.

Mr. Callahan: For small employers too.

Mr. Sheehan: For small employers too; for both parties. Arbitrators go for fees of up to \$1,500 a day. It can be quite onerous. Frankly, I have not given that much thought; I do not know whether Mr. Nicholson has. We have not taken a position on the question of who should do the actual funding of the arbitrators.

Mr. Callahan: That seems to be the conundrum in a different vein, in things such as planning matters going to the Ontario Municipal Board, litigation for a lawyer and so on. If there are no economic sanctions, who cares? If you have a bottomless pit that a large amount of your costs are going to be paid out of, why not continue?

Mr. Sheehan: That is true if everything is paid for. It is not realistic in this situation because you would have to get to a board of arbitration. As the legislation exists, a union could not say, "We are going to arbitration."

Mr. Callahan: Let me put it this way. You say the small union or the small employer would have difficulty in covering those costs. If it were left to the board to determine at the end of the arbitration whether one party should be penalized in costs or perhaps should not, and it was found that the position taken by both parties was reasonable, then perhaps costs could be paid out of the consolidated revenue fund. If the board found it was an unreasonable position, then it would penalize the party that had taken those unreasonable steps by making it bear that cost.

Mr. Sheehan: The problem is we are reluctant to get into the situation of, in a sense, putting restrictive access on a party's ability to go forward. If a union or an employer says, "We might, in the final analysis, be swamped with a whole bunch of costs," then their legitimate rights might never be enforced. They might be reluctant to go forward.

Mr. Callahan: The Ontario Labour Relations Board could take the position that if it were a clear and blatant effort by either side to eliminate the rights available under the Ontario Labour Relations Act, that is when they would be tapped. They would have to look at that so you would not get any game playing.

Mr. Sheehan: The board does have remedial power now to impose certain costs. For example, it can enforce all the costs taken by the union in going through fruitless negotiations. It can impose those costs upon the guilty employer. But to suggest that somehow there should be some sort of cost mechanism, similar to the civil situation, I do not see it. It would be much like the civil situation. At times, people are reluctant to exercise their rights because they face these prohibitive costs down the road. Over the last

couple of years the labour relations board has functioned rather well on the basis that people can go forward with their rights. If there is no substantiation to their rights, the board says, in one quick day, "There is nothing here."

11 a.m.

Mr. Callahan: What is your position, in the final analysis, on the question of whether the chairman's costs should be paid out of the consolidated revenue fund?

Mr. Sheehan: Are we speaking of the board's costs for the arbitration?

Mr. Callahan: No, the chairman of the arbitration; that was the position that was put to you.

Mr. Chairman: Subsection 40a(8) of the bill.

Mr. Sheehan: We think it should be paid out of general revenue.

Ms. Nicholson: Small unions and small employers can be wiped out by those costs.

Mr. Mackenzie: The danger in what you are suggesting, Mr. Callahan, is that there is already a real problem in arbitration in the trade union movement with smaller unions as it stands now. Generally, arbitrators' fees are back up to \$1,500 a day; I have seen them even higher in recent days.

The employee, though, in deciding to fight for a position, and his union in deciding to support him in arbitration, know what the costs are going to be. They are heavy, and that already stops a number of unions from proceeding down that route. If there is the additional risk that you may get all the costs thrown at you by a decision of the arbitrator if you do not fight for something you feel very strongly about, I suggest that even more workers and more unions are not going to be fighting for their rights, and that is a dangerous road.

Ms. Nicholson: A union such as ours, which is a large Canadian union, can afford to go to arbitration and fight for its members' rights. If you take a very small union or a very small employer, I think what Mr. Mackenzie is saying is absolutely right: You can wipe them out. They will not go that route because they cannot afford to go that route. I think it is a two-way street when you speak of the smaller groups. In my union the costs for arbitration in a year across this country are horrendous. We can afford it; they are big.

Mr. Callahan: It was the typographical union that suggested it, was it not?

Ms. Nicholson: We are talking about the small unions and the small employers.

Ms. E. J. Smith: I think this is an important point, and I am glad you introduced it. We are not necessarily talking about the downtrodden worker; we are talking about the small versus the big in this balance.

Ms. Nicholson: That is right. I think Mr. Mackenzie made it very clear that this is the way it would go.

Mr. Chairman: Are there any further questions from the members? If not, we thank the Canadian Union of Public Employees for its presentation. As Mr. Gillies said, it was thought provoking. We appreciate the fact that you have come here and shared your views with us.

The next group, Arlington Crane Service Ltd., is not here at this point.

Ms. E. J. Smith: Mr. Chairman, given a couple of minutes here, could I introduce a concern that I have? Although Mr. Cooke is not here, I know he shares it.

I would like to propose to this committee and to you as chairman that we delay the clause-by-clause consideration until the House resumes. I would like to put this forward for two reasons.

First, having sat with this committee before when we did the report of the Workers' Compensation Act report, I thought the material we got from the research staff, which summarized and put together the various suggestions on the various clauses, was very important. I have made massive notes here, but I am not a research expert and I would like the time to have that kind of material in front of us.

In the second place, no matter which side we hear from, we have become aware of how important every detail of this bill is, because what we do here will determine legal proceedings. As has been pointed out--and I agree--when you get into prolonged legal proceedings, the smaller group suffers. Therefore, even more so than on the Workers' Compensation Act report, which was a report, we should take long and careful consideration of all the presentations that have been in front of us.

I would much prefer to have a report done, have some time to study it and come together after the House resumes to do the clause-by-clause stage.

Mr. Chairman: Are there any other comments on that?

Mr. Mackenzie: I have some difficulty with that. I understand the need to absorb some of the material for a lot of members of the committee. I do not profess to absorb all of it very quickly at any time, but it is an issue that is very clear in the minds of most of those who are involved.

I cannot speak for a small individual employer, and I will not try to do so, but for any lawyers who are representing them, for any people with any labour background, for the unions or their counsel, it is a major issue. We are dealing with a small number of cases, but they have been very bitter, very brutal and very devastating in terms of the relationships and the feeling of whether the law does support ordinary workers in this province.

I am fearful of a delay. The crux of this whole bill is in about three or four sections at most. The members here should be able to absorb readily enough the changes that have to be made or that they are not going to make. If I thought delaying it another two, three or four weeks would change any basic attitudes, I might say that is fine and dandy.

I do not want to see this legislation, which the government has promised and which we have supported, delayed in this session of the House. If we are going to wait, we will lose a week or two right off the bat with the ceremonial natures of the speech from the throne and the opening of the session, and we might be competing for time many weeks down the road. That

would not be in tune with the expectations of the people who are vitally concerned with this kind of legislation.

It may be we cannot reach an agreement in the one day we have for clause-by-clause discussion. I do not know why we could not, but I am not sure what we would gain by not trying to do it in that time.

Mr. Gillies: I am somewhat torn on this. I have no particular objection to our taking the remainder of the time until the House resumes to consider what amendments we might want to make. I was quite prepared to spend this weekend sitting at home drafting amendments to have them ready for next week. I would prefer to have a little time to have them gone over by legal counsel and so on.

On the other hand, I am very conscious of Mr. Mackenzie's concern. If this is going to be pushed back on the committee agenda so it is a considerable time before this matter is dealt with, and I am sure Ms. Smith shares that concern, I do not think any of us wants that. If we can be guaranteed that the first item of business on the committee's agenda will be to complete consideration of this bill when we resume after the speech from the throne, then I have no problem. If it is going to drift off somewhere into Never Never Land--

Mr. Mackenzie: There is no way of knowing the bill will be passed.

Ms. E. J. Smith: The committee supports that.

Mr. Gillies: I think we can have some assurance from the chair and the House leaders. However, I agree with Mr. Mackenzie that we would do a disservice to both the employers and the employee representatives who have appeared if this is shoved on the back burner and we do not deal with it as soon as the House resumes.

Mr. Chairman: I remind you we are talking about one day; we are not talking about going into another week. The only time we have is a week from tomorrow. That would be the only day.

Mr. Taylor: Without getting into my rate of absorption--

Mr. Chairman: Which we know is astronomical.

Mr. Callahan: Only your liver knows.

Mr. Taylor: I have been fairly attentive and I would just as soon proceed while the matter is fresh in my mind. As you know, the Conservative caucus has opposed the bill in the House.

Interjection: Are you changing your position?

Mr. Taylor: I do not think our position has changed. If it is to proceed, let us get on with it; that includes clause-by-clause. I understand Mr. Mackenzie's concern. I read in the paper yesterday that there was concern about some other legislation that was being deferred. I guess there is that fear of promised legislation being deferred. As a party, we would just as soon defer it for ever. However, if we are charged with the responsibility of dealing with it, I think we should get on with the job and get it done.

Ms. E. J. Smith: I want to be clear, because I am running into two

statements, both of which imply that your minds are made up. I have forgotten Mr. Mackenzie's exact words.

Mr. Chairman: Let us not debate that.

Ms. E. J. Smith: Mr. Taylor said his party has taken a position and he knows what it is.

Mr. Taylor: Did you not know that?

Ms. E. J. Smith: Yes.

Mr. Taylor: It was taken in the Legislature, so it is nothing new.

11:10 a.m.

Ms. E. J. Smith: I quite agree, but I am assuming we do not hold all these committee meetings to no purpose and we are examining other than positions that have been taken. There are things in here I am wondering whether we can change in keeping with the positions we have heard.

Even though your party has taken a position on the principle, for instance, as a group we have not yet discussed clause 15(a), which I think will make a very interesting discussion. That is only one example. It is very important to look at these things. I do not know whether you saw it, but the kind of report we had from the administrative staff to work with at the time we did the Workers' Compensation Board review was extremely useful. I would like to have that opportunity. I do not know why we have all these people sitting here if we do not take advantage of them.

Mr. Taylor: It is your government.

Mr. Gillies: I wish to be very clear on this. The Progressive Conservative Party opposed the principle of this bill on second reading. Now with the reasonable assurance that one form or another of this bill will become law, we will be moving a number of amendments to improve it. As far as I am concerned, these hearings have not been a waste of time at all. In fact, I am already thinking about the changes we would like to see in the bill.

Ms. E. J. Smith: That may take more than a day.

Mr. Chairman: Let us call this debate to a halt now. We do have other presentations this morning. This afternoon at two o'clock we will decide whether we will meet next Friday. That will give you a chance to consult with your colleagues, so we are not pulling any kind of surprise if it comes to a vote on whether we sit next Friday. You will have ample opportunity to consult with your colleagues, and we will make the decision then.

Let us move on to our next presentation, from Arlington Crane Service Ltd., Mrs. Dolly Foran. Welcome to the committee. We are anxious to hear your views. A copy of Mrs. Foran's brief has been distributed to the committee members.

ARLINGTON CRANE SERVICE LTD.

Mrs. Foran: Before we discuss the pros and cons of the amendment to the Labour Relations Act introduced by the Minister of Labour (Mr. Wrye) on November 26, 1985, let us take a hard look at the present Labour Relations

Act. Before the passage of this act, labour relations were governed by rule of law that spanned the law of property, contract, tort and procedure. Politicians created a cartel to control the people and the free marketplace and to enhance the trade union movement.

Under labour legislation, common law principles have given way to a complex body of statutory and administrative law that treats labour law as a separate and self-contained subject. The central question is whether there is warrant for the special treatment labour law receives today. This labour legislation is in large measure a mistake that, if possible, should be scrapped in favour of the adoption of a sensible common law regime, relying heavily upon tort and contract law. The tort principles protect all individuals against the use of threat of force and are of great relevance against the deliberate inducement of breach of contract. The contract law allows individuals within this framework of entitlements to make whatever bargains they please with whomever they please.

This labour statute was said to be designed to cure the present system of its imperfections, if only to save capitalism from its own excesses. It seems appropriate, therefore, to ask how any system of labour relations can be squared with a sound theory of individual entitlements and their social protection. The particular conditions of labour unrest in the 1930s and before is no reason to hold modern labour law sacrosanct because it gained its maturity in the 1930s and 1940s. Indeed, a sense of quiet desperation may well have led to the passage of labour statutes which in calmer times would have been rejected as destructive of personal liberty and economic wealth both for society as a whole and most, but never all, individuals with it.

In our normative account of labour relations, it is proper to stress that common law rules in their ideal form make legal entitlements among strangers without reference to personal status. Legal rules do not refer to flesh-and-blood individuals but to those helpless abstractions A and B, about whom nothing else is known or, more to the point, is relevant.

It may well be that certain individuals will in the end assume certain well-specified roles, but if so, there is no reason to have legal institutions either subsidize or penalize their efforts. Individuals should not have to sacrifice their rights against the rest of the world because they become employers and employees. Stating propositions in general is, moreover, a powerful antidote to abuse and favouritism, even if, standing alone, it cannot guarantee a just set of rules or outcomes.

Labour legislation context is ambiguous in that it attaches only to the right of disposition. To be universal in application, the right of disposition must be understood to include only the right to offer one's services on whatever terms and conditions one sees fit. In good Hobbesian fashion, the appetite of every person determines the appropriate terms of exchange. The system can now specify the correlative obligations of the right to offer one's labour unhindered, without interference by force or fraud, which can be held simultaneously by all individuals.

Over time, the original distribution of wealth is likely to change as labour is exchanged for labour or for capital. Within the liberty-based framework, no limitation is placed upon the voluntary recombination of entitlements by their holders, original or derivative. Any set of moves is as good as another, as long as the moves themselves do not violate the rights of third parties.

Becoming an employer or an employee is strictly a private act in which one person decides to offer his own capital in exchange for the services of another individual, or vice versa, on whatever terms the parties to the exchange see fit. The parties' decision to enter into a contractual agreement does not increase or decrease the sum rights they have against the world or which the rest of the world has against them.

The creation of voluntary arrangements is, therefore, never an occasion for increased state regulation of private transactions, apart from the faithful enforcement of their agreement, be it in employment relations or anything else. As the identities of the contracting parties and the terms on which they contract are of no special concern to the state, a contract between an employer and employee is indistinguishable from one between two prospective employees.

The protection of labour unions from doctrines of criminal conspiracy, therefore, should not depend upon the elaborate affirmative social justification for their use. If A could enter into a contract with a prospective employer, then there is no reason he cannot enter into a contract with his potential rival B to present a united front against the employer. Similarly, the voluntary formation of labour unions need involve neither the use of force and fraud nor the inducement of breach of contract.

11:20 a.m.

There is, therefore, no need to appeal to special justification to account for the legality of labour unions, as it is already accounted for by a general theory of entitlements. To be sure, there are profound differences in the worth of the original set of endowments held by individuals and by the firms and organizations that they created, but these have only descriptive significance in predicting what moves the parties will make within the rules.

The refusal or inability to predict which arrangements will emerge in no way amounts to a defect of the theory. Prediction is within the province of economics and sociology. The function of a system of entitlements is only to determine after the fact whether the patterns that have emerged fall within the proper rules of the game. The law of contracts is no more designed to predict the terms contained in particular contracts than the rules of chess are designed to determine the soundness of the Ruy Lopez. The strength of the theory is revealed by its treatment of recurrent problems in the law of labour relations, the role of malice and combination in labour disputes, the exclusive bargaining in employment relations and the question of strikes and picketing.

The question of combination raises different concerns. The legality of organizing across industries may allow unions to obtain a degree of market power that in the absence of their combine exemption would trigger the application of the combine laws. The matter becomes particularly pressing once it is recognized that prohibitions against horizontal arrangements between firms will be less effective if unions remain free to capture monopoly profits in the form of higher wages.

One can argue that entry from nonunion firms will discipline the behaviour of unions, but under combine law the absence of legal barriers to entry need not be regarded as any more decisive in labour than in ordinary product markets. One could therefore extend the analysis quite naturally to argue that unions should be allowed to organize individual firms, but that no single union should be able to represent workers of rival firms where a

combination between those firms, qua firms, would represent impermissible market power.

This compromise solution would permit unions to improve relationships between management and workers within the plant by handling personnel and public relations problems, but it would blunt their monopoly power. The effort to subject unions to combine laws, therefore, is supported by a coherent, if controversial, normative theory, even if the chequered history of the union exemption from combine laws itself defies rationalization.

The critical point is that the relevant class of third-party effects embraces all of the society at large, not just unions. Suppose a group of producers asked the Legislature to prevent rival firms that refused to join their cartel from selling in the marketplace. The short response is that combination among producers is the very thing that combine laws are designed to prevent, so that the nonjoiners are beneficial in determining monopoly control.

First-contract legislation will rely heavily on good faith. The difficulties with the duties to bargain in good faith under the labour statute are perhaps clarified by a comparison with the issue of settlement in both civil and criminal law. In the civil law, litigation is settled with each party acting under the threat of coercion from the other side. In contrast to most markets, neither party can go elsewhere if he does not like the offer received from the other side.

The same is true about plea bargaining in the criminal context; the accused does not go free if he cannot strike a deal with the prosecutor. With the duty to bargain in good faith, the labour situation is transformed from the market case to the litigation case. Protracted negotiations can take place to determine the ultimate outcome of what is, when all is said and done, a legally created, bilateral monopoly.

No nascent standard of good faith effectively constrains these negotiations any more than it does for civil settlement or plea bargaining. The most that good faith can demand is that the parties not press claims or defences known to them to be groundless. But this constraint is of virtually no relevance in the labour context, where the matters in dispute are economic demands rather than the soundness of legal theories; employment negotiations provide no comparable necessity for the creation of a complex institutional structure at contract formation.

On matters of money and conditions of employment, the very notion of good faith has no internal intellectual coherence because there is no theory of the just, contractual outcome to which it can be tied. All that can be done is penalize individuals for candour or inexperience and inject an element of public oversight that can only complicate any real negotiations.

Even without the passage of the Labour Relations Act, one can expect some very difficult negotiations between employers and employees over the division of the pie. Yet the statute, by making a union the exclusive bargaining representative, increases both the cost of negotiations and the likelihood that no effective agreement will be reached. The parties will play nonco-operative games with each other. Their bluff and bluster will increase the chances of a strike, even if both sides would have been better off with some agreement that would spare them the extensive costs of strikes. Matters become even more complicated when the response to unionization includes the possibility of industry-wide bargaining or the concentration of economic

pressure on some firms in the industry, perhaps after a quick settlement with others.

The increased frequency of impasse in turn gives greater scope to the act's unfair labour provisions, which are sufficiently elastic to allow colourable claims to be filed with the labour board whether or not some agreement is reached. The creation of exclusive rights of representation, coupled with the duties to bargain, shows the want of wisdom in replacing simple institutional arrangements with very complex ones.

The bargaining structure under the act also increases third-party costs, as other individuals and firms are forced to reorganize their own affairs to respond to increased costs and lower reliability of the current labour structure. Tracing consequences through a chain of customers and suppliers raises administrative complexities sufficient to daunt the spirit of any common law court, which largely explains the common law's unwillingness to give much protection for interference with prospective advantage. The preferred solution is to eliminate the structures that cause these dislocations.

As political pressures prevented the repeal of the Labour Relations Act, the response to the unfortunate status quo ante has been further government intervention to restore some balance to the system. The insistence upon good faith negotiations is one such effort, and now we are faced with another effort in first-contract legislation. Since no one can fine-tune so complicated a mechanism, every effort at adjustment imposes additional tensions upon the system.

11:30 a.m.

The elimination of the basic structure is necessary, not the further embellishment of the regulatory pyramid. When the statute says that employers may not enter into direct negotiations with individual employees over the terms and conditions of employment, it imposes restrictions upon employers and employees alike. The justification offered for this exclusive right of negotiation is that, without it, the employer will skim off the best workers and discriminate against union supporters, thereby depriving the union of its strength. While the factual assertion may be true, the equation of the union with the social interest is not.

The problem here goes to the root of representative government. Under the common law system, the original position, each individual worker had a clear and well defined set of rights, good against the world and now guaranteed by our new Charter of Rights and Freedoms. He was therefore entitled to bargain those rights away to either the union or the employer for whatever consideration he saw fit. The determination of rights under the system of collective bargaining creates greater stress.

Now no party derives its rights by agreement from a clear original position. Instead, a majority of workers within an appropriate unit may choose the union as the bargaining representative of that unit. Thereafter, the union represents both its supporters and its opponents within the unit, whether or not they are union members. The original and guaranteed entitlements are very much in doubt.

The union interests itself in no unitary whole, but instead in a complex amalgam of the individual interests of the many actors who play on the expanded stage. Compulsory unionization creates no nonappropriable public

good, but only a complex network of institutions, such as labour boards, to distribute the cash or in-kind benefits to its members. The basic structure of the Labour Relations Act thus forges a powerful commitment to administrative government to which courts are required to give great deference.

Why should anyone want to adopt this structure? We are told it is done in the name of industrial peace and industrial democracy. As regards the first, we can assume the end is good but question whether the statute is the means to achieve it. Mandatory bargaining by exclusive representation increases the likelihood of bilateral monopolies that reduce the likelihood of agreement. On the question of violence in principle, the response should be clear. Violence should be punished no matter who is responsible, but it is mistaken to ignore the heavy social costs that may be associated with its suppression, especially if there is widespread political support for those who have committed it.

Therefore, it may be suggested here that the purpose of the statute is to defuse violence that might otherwise occur by offering some improved chances of unionization. Yet support for the statute on this ground is itself fraught with peril. It is simply a pragmatic argument which says that sometimes it is better to surrender to the threat of illegal force than it is to resist it. What is lost is any prudential argument that these structures ought to be preserved as a right, even in a world without violence. It therefore becomes a purely tactical question of whether the rest of society is better off with the adoption of the new legislation or with punishment of violence when it occurs.

An analogy to the issue of freedom of speech is appropriate. In certain cases it is said speakers should not be allowed to air their views because others may respond with violence. Yet the general answer is that no one should be allowed to suppress the rights of another by committing or threatening a wrong, save in very extreme situations. The speech should be protected and the violence punished or prevented if and when it occurs.

Another analogy comes from the law of self-defence. A defendant who does not use excessive force may inflict harm upon the plaintiff that exceeds the harm he expects to suffer, again on the principle that those in the right need not yield as a matter of course to those in the wrong.

The same principles can be extended to labour disputes. If an employer wants to employ only nonunion labour, his right--and it is a right--should be abridged only as a last resort when those opposed to his decision might take to the streets. These happenings are best handled by direct reform of criminal and safety procedures and not by the introduction of an elaborate scheme of labour relations ill tailored to the evil to be avoided.

The state with its monopoly of force is already in place in the political context. We appeal to democracy because the building blocks of contract, property and tort fail singly and in combination to account for any monopoly of force within the jurisdiction. Yet once the basic political order is assured, there is no reason to take the second-best alternative in labour relations when the best is still available. Those workers who want to form voluntary organizations should be allowed to do so. It is not part of voluntarism or democracy to grant workers the power to conscript the employer and dissenting workers into the service of their cause.

It may be said that workers will be alienated from their jobs without the protection of unions. This argument cannot explain the faction of workers

who would rather deal directly with the employer. In no event can it justify the basic structural decision of the Labour Relations Act that forbids employers to negotiate contracts of employment directly with workers without union intercession, even with regard to their individual grievances under the collective agreement.

To repeat the central point, an argument against the Labour Relations Act is not an argument against unions as such; it is an argument against the special privileges and immunities this statute confers upon them. Where unions are necessary to foster communication, they can emerge in a voluntary situation in a form less formal and less adversarial than it is today. The frequently cited goals of labour organizations do not justify the essential features of the modern law.

Before this government places yet another onerous amendment, such as first contract, to the Labour Relations Act, fairness, justice and equality for each and every citizen, whether employer or employee, must be addressed. Labour relations have become a serious problem. They promote division, dissension and unemployment. The present government's mandate is to ensure that our democratic process blossoms to its fullest, recognizing that each and every citizen is equal before and under the law.

Labour law is a political law which might have been just at its inception, given the perceived circumstances, but the pendulum has swung too far. Given the present circumstances of our economic deterioration, passing first-contract legislation can serve only to entrench the powers of the trade unions even deeper, with the end result being the loss of thousands more businesses and the ultimate loss of hundreds of thousands of jobs.

Do the Premier (Mr. Peterson) and the Minister of Labour (Mr. Wrye) really wish to foster this scenario, or will they consider an economic resurgence with full employment for all the people of this province? Workers' utopias are not created by compulsory laws or illusionary promises; they are created by a climate of economic health and the mutual respect fostered between employers and employees.

11:40 a.m.

Mr. Chairman: Thank you, Mrs. Foran, for your thought-provoking and wide-ranging presentation to the committee. If there are any questions, I urge that they be directed to aspects of the presentation dealing with Bill 65 rather than the Ontario Labour Relations Act as a whole.

Mr. Taylor: With respect, Mrs. Foran, I do not think you have addressed the sections of the bill as such. Your brief has been directed towards the argument that there should not be a bill. Am I correct in that perception?

Mrs. Foran: What you are doing with first-contract legislation is making an amendment directly to the Labour Relations Act. It is very important before you pass more amendments and keep building this terrible pyramid that you look at the basic structure on which you are placing the amendment.

That is why it is important for you to realize that labour law is designed by politicians but actually set outside of our common law. Common law was brought to this country when the country was founded. Each and every citizen of this country is bound under common law. Yet the Legislature saw fit to design a law and set it outside of the common law of this land, making the

trade union movement completely over and above the ordinary citizens of this land.

That cannot be tolerated any more. You cannot keep putting amendments until you take a darned good look at the structure on which you are putting them. The whole structure has to be looked at in regard to each and every person in this province before you can add anything else to it.

Mr. Taylor: I appreciate your comments. You are suggesting we should be reviewing the entire field of labour relations.

Mrs. Foran: That is right. You do not keep putting storeys on a house if the foundation is rocky. All you are doing is adding storeys to it without paying attention to the groundwork, the structure of the whole system. You cannot keep adding to it without looking at it as a whole first.

Mr. Taylor: What type of business is Arlington Crane Service Ltd.?

Mrs. Foran: I am in the crane service business.

Mr. Taylor: Can you tell us something about your business?

Mrs. Foran: We own cranes which we rent out to construction industry operators.

Mr. Taylor: Are you unionized?

Mrs. Foran: Yes, not voluntarily, but we have been for 19 years.

Mr. Callahan: I am going to ask one question which addresses Mr. Taylor's zeroing in on the chairman's comment that what we are really dealing with here is the question of first-contract legislation.

I listened with interest to your brief. On page 5 you say: "Why should anyone want to adopt this structure? We are told it is done in the name of industrial peace and industrial democracy. As regards the first we can assume the end is a good." If that comment is correct, and if you understand the reason for first-contract legislation is to avoid the disruption that has occurred in society and in the community because of the inability to achieve a first contract--

Mrs. Foran: Do you think that adding first contract to this onerous law is going to bring peace? I can assure you it will not bring peace.

Mr. Callahan: All I am addressing is the point in your brief where you agree that as regards the first, namely, preserving industrial peace, the end is a good end. You agree with that.

Mrs. Foran: We do not agree that the statute is the way to achieve it. We agree that industrial peace and industrial democracy--

Mr. Callahan: I appreciate your comments on the Labour Relations Act, but as the chairman has indicated, we are here to address the question of first-contract legislation.

Mrs. Foran: Right.

Mr. Callahan: The purpose of first-contract legislation is as I have

stated, to avoid disruption and to maintain industrial peace. Therefore, recognizing that principle, I gather you are saying that you are in favour of industrial peace.

Mrs. Foran: I am always in favour of peace--

Mr. Callahan: Thank you very much.

Mrs. Foran: --but I am not in favour of having a first contract shoved down the throat of every businessman in this province. That is exactly what first-contract legislation will do.

Mr. Polsinelli: Mrs. Foran, earlier in your remarks you indicated that your company has been unionized for 19 years.

Mrs. Foran: Yes.

Mr. Polsinelli: What were your first-contract negotiations like?

Mrs. Foran: We did not have any. We bought one crane. My husband was driving it. We had been in business about a month. My husband was going to a job site one day and the union business agent pulled the crane over to the side of the road and said, "You will sign this contract." My husband said: "I do not have any employees. It is just me and my crane." To which he replied, "Without signing that collective agreement, you are not moving another wheel." That is how we got our first contract.

Would you like me to tell you some more horror stories of the unfairness?

Mr. Polsinelli: Tell me about your second contract.

Mrs. Foran: We were hauled in by the union to a meeting of five little companies in the Hamilton-Brantford area and ordered to join the Crane Rental Association of Ontario under threat of having our businesses closed. We hired a lawyer, who told us: "Well, you are all very small businesses. They will put you out of business; so join the crane rental association." I just had to accept whatever I was given through the crane rental association, but I did not join voluntarily.

Mr. Polsinelli: Thank you.

Mr. Chairman: There are no other questions. I would like to thank you for appearing before the committee.

11:50 a.m.

The last presenter this morning is Gilles Beauregard, secretary-treasurer of the Office and Professional Employees International Union. Mr. Beauregard, welcome to the committee and please have a seat. Copies of your brief have been distributed, and we are pleased you are here to make your presentation.

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION

Mr. Beauregard: I am here this morning not to talk to you about the legalistic aspects of Bill 65. However, I may have my own remarks to quote as I go along in my brief. I want to talk to you about a struggle we came through in the last seven months. It has been a bitter strike and that experience may be useful for this committee.

OPEIU represents 25,000 office, clerical and technical employees in Canada. Being one of the youngest labour organizations, we have had more than our share of first-contract negotiations in recent years. Being an office worker myself, who had imposed arbitration on a first contract at one time, I appreciate more than anybody else the importance of such first-contract arbitration. In my case, if it had not been imposed through legislation, we would not have been able to achieve a first agreement. Although I did not fully agree with the imposed agreement at the time, looking back, it provided us with a tool to achieve over the years one of the best collective labour agreements in that industry and today we enjoy one of the best labour-management working relationships.

For the last 24 years, I have been fortunate enough to travel and negotiate throughout the country from Newfoundland to Manitoba. In the last 14 years, I have been regional director and vice-president of OPEIU in Ontario. First-contract negotiation is far from being an unknown subject to me.

As I said earlier, I do not intend to go into the legislative aspect of Bill 65, except to say to this committee that in my view Bill 65 as presented in first reading will not serve its purpose if the intent is to give access to first-contract arbitration. I have gone through a painful seven-month strike recently and we would still be on strike if the regulations presented in Bill 65 had existed. I will comment on that later in my presentation.

I firmly believe we have to be very cautious. If we try to please everybody, we will most likely end up with a new playground for a number of legal consultants whose existence is not to ensure that a first agreement be achieved but to crush any effort to achieve it. I am sure you will be told by small businessmen and medium-sized entrepreneurs that allowing automatic access to first agreement will destroy their enterprises. They are the same people who will seek the best union-busting consultants and spend tens of thousands of dollars to ensure that it drags on in the hope that over a period of time, with turnover in personnel and frustration, they will manage to defeat the union instead of investing such amounts in industrial peace. Their basic argument does not stand; they just do not want to have to deal with organized labour. Labour history proves that.

The ones who mainly are destroyed or crippled following a labour dispute are the mothers and the fathers who are the only breadwinners in the family. These are the ones the new legislation should address itself to. We have to ensure they will no longer be the scapegoat of any ineffective legislation. Let us not make the same mistake that was made in British Columbia and Quebec, where accessibility to first-contract arbitration is practically impossible to achieve, and when it is achieved, it is at enormous cost.

OPEIU may not have been in the limelight as have United Steelworkers of America, United Auto Workers Union of Canada or any other large organization, but we have had our Radio Shack. At the Union du Canada in Ottawa a few years ago, there was the same situation as with Radio Shack. Similar remedies were imposed by the Ontario Labour Relations Board at unbearable cost and by a dragging process.

As I said at the outset, I am not here to go into the legalistic aspects of Bill 65. I am not a legal mind; I am simply one of those who has been down the trenches, saw the action and casualties, but has not seen an employer being one of those casualties. What we really need is a fair balance in industrial disputes. Basically, I am here to tell you about a recent labour dispute, which most of you may not have heard about. It is similar to that of

Visa, but in a different context. It took place during the same period and it took the same length of time.

It took place in a community called Kapuskasing. First, let me tell you about Kapuskasing. It is what we call a paper town, a one-industry town, located 600 miles north of Toronto, and, believe you me, a town with short summers and long winters; I can vouch for that. It takes three and a half hours to get to Kapuskasing by plane if the weather is nice at a cost of approximately \$350. Kapuskasing is a community where most of the workers are organized. Therefore, one would never think that an anti-union attitude could ever exist in such a community.

In October 1984, 38 women, that is, 98 per cent of the employees involved in that bargaining unit, called upon OPEIU to represent them. They were employed by the Caisse populaire of Kapuskasing, a financial institute governed under the Credit Unions and Caisses Populaires Act.

The caisse populaire has branches in Opasatika, 25 miles west of Kapuskasing, Val Rita with Kapuskasing being its head office, Fauquier, Moonbeam and Smoots Rock Falls, 45 miles east of Kapuskasing. The caisse populaire is one of the biggest financial institutes in northern Ontario, with assets of more than \$57 million.

OPEIU was issued an interim certificate in November 1984, and on December 18, 1984, an agreement with the party was reached on the definition of the bargaining unit. The union presented its proposals in the latter part of January 1985 and negotiations began in February 1985.

During the period from January to June 1985, we were faced with continuous harassment from the employer--suspensions and arbitrary transfers with changes in the working conditions of the employees, which hampered the negotiation process. Some of you may wonder why we did not file complaints with the Ontario Labour Relations Board. If we had used that recourse, we would have been at the labour board every day of the week from January to June 1985; it was that bad. It became obvious to us from the outset that the employer had no intention of reaching an agreement. However, a number of unfair labour practices were resolved between the parties. Many remain unresolved.

If we had gone to the labour board, it would have been at enormous cost because of distance, and probably we would still be waiting for a decision due to the number of infractions. We opted for a different approach to avoid delaying the negotiation process. In May 1985, after two months of negotiations and nothing being agreed to, to accelerate the process, we applied for conciliation, which was fruitless. We then requested a no-board report to force the employer finally to bargain.

In June 1985, management refused mediation and called a meeting on June 19 to present to the union "our first and final proposal". It explained its position as being fair and reasonable, representing its concept of what should exist in a co-operative movement. It also informed us that only minor changes could be made and these through means of communication, such as correspondence and telephone conversation. It had no intention of having any further meetings.

The local union president and myself pleaded with management to pursue negotiations on June 20 and 21, 1985. We told management that its proposal was unacceptable and that further discussions should take place. On June 27, we decided to proceed to strike action.

12 noon

Between June 19, 1985, and August 2, 1985, numerous attempts were made by the Ontario conciliation and mediation service to bring both parties to the table for negotiations. On each and every occasion, we were faced with management's refusal to meet. On August 2, 1985, Mr. Illing, director of mediation services, after discussions with both parties, scheduled a meeting for August 7 and was told at that time that management might not show up. On August 7, only the union and the mediator were present. This action of management, by the way, is not recognized under the Labour Relations Act as bargaining in bad faith. There is no obligation on the parties to be forced to a table of negotiation to follow a request of the Ministry of Labour. This is unfortunate.

Subsequent meetings of direct negotiation were held in August and September and were fruitless on each occasion. The employer's only intention was to show to the community that it was well-intentioned but not intent on reaching an agreement.

In September, as we were progressing into our third month of the strike, we went to the community and sought its support. In the meantime, a group of pensioners and members of the caisse populaire filed petitions with the regional member of the provincial parliament, who happens to be a minister of this government, unfortunately with little success after three months of waiting for a reply and some action on the petition. After two or three months of striking, I was personally contacted by the ministry office to brief it on the issues at stake.

From September on, a political action committee of every segment of the community, including the labour movement, was formed and the community took the issue in its hands.

In October 1985, Vic Patne, assistant deputy minister, industrial relations division, appointed Romaine Verheyen, a senior mediation officer. He came to Kapuskasing unannounced, for good reasons. He met with the employer for two days and finally got it to agree to get back to the table of negotiation. I strongly recommend to this committee that it ask Mr. Verheyen his version of what really took place. Not only should this committee inquire of Mr. Verheyen, but also it may be useful for you to be aware of the views of Ray Illing and Vic Patne, as they were personally involved.

Finally, because we saw very few possibilities in resolving this dispute, we followed legal advice and decided to file a multitude of complaints under the Labour Relations Act, including unfair labour practices, in November 1985.

In December, Vice-Chairman MacDowell was appointed and met with the party legal advisers on December 12 to set the ground rules for the hearings. We were advised at that time that the only dates the Ontario Labour Relations Board had available for continuous meetings were at the end of February 1986. I cannot express in proper terms our real feelings about this frustrating news. It proves, again, the inaccessibility of our present system. I am positive that had we done anything illegal, we would have been down to the board within two or three days of any employer's complaint. How can the labour movement not be doubtful of any effectiveness of any such proposed legislation as outlined in Bill 65 in its first reading?

Upon the expiry of our six months on December 28, 1985, the employer,

sure of itself, hired 18 new employees instead of waiting until January 6, 1986, the date of the annual meeting, at which time nine board members out of 11 were coming up for election. It is to be noted that in the past 250 to 300 members attended the annual meeting. On January 6, 1986, to management's dismay, 1,623 people from all segments of all communities attended the annual meeting. The result was that new board members were elected. It should be a lesson well learned for anyone who believes that 38 determined women cannot achieve their goal.

Following the election of the new board members, the union was called to the negotiating table. Negotiations began on January 17, 1986, and a settlement was reached on Thursday, January 23, 1986. It is to be noted that no agreement had been previously reached on any of the articles of the agreement.

These are the general views of this struggle for a first agreement. Unfortunately, in the short period of time that is allowed it is very difficult to express in real terms the frustration and bitterness of those 38 women. It has left a bitter taste among the population and has divided the community for years to come.

Had this financial institution not been a co-operative movement and had it not been possible to remove the anti-union officers from office, I ask myself whether the strike would have ended up similar to the struggle of the lumber and sawmill workers, I believe in 1962. I am sure cool heads, not on our part but on the part of the population at large, would not have prevailed under different circumstances.

In conclusion, I hope the experience of this struggle will justify the modification of your proposed Bill 65 and that we will not wait for a situation such as happened at Pratt and Whitney Canada in Longueuil, Quebec, in the 1970s to justify this government in acting, so it is not caught as the Quebec government was. We should have the foresight to ensure industrial peace and provide for automatic access to first-contract arbitration. If the workers have the right to freedom of association without the possibility of a first collective agreement, then such a right is useless.

I would like to take this occasion to thank Vic Pathe, the assistant deputy minister for industrial relations; Ray Illing, the director of mediation services; Romaine Verneyen, senior mediator; and Hap Loranger for all their efforts in this dispute. However, we recognize that their efforts, unfortunately, are limited by the legislation with which they are working.

Last but not least, I would like to thank Bob Mackenzie, the Labour critic of the New Democratic Party, for his tremendous support and his numerous interventions on our behalf from the beginning to the very end of the strike.

I would like to thank the members of this committee for giving me the opportunity to make our presentation.

Mr. Chairman: Thank you, Mr. Beaugard. It is very helpful to the committee to have a presentation that details the specifics of a first-contract dispute. We appreciate your presentation.

Mr. Mackenzie: I appreciate the final comments. I want the committee members to know I did not know they were in the brief, whether they want to believe me or not. I had nothing to do with it.

I want to make one or two comments on this. I think some of the meetings referred to in the report were brought about by pressure that I was bringing almost constantly during that strike. I got through to the minister, to the member for Cochrane North (Mr. Fontaine) and to a number of other people on several occasions. I worked as hard as I could trying to go through the system with Pathe, Armstrong and Ray Illing. It became clear early on that there was total recognition that the problem was entirely with management in that operation. Some of the strongest words were from Ray Illing who does not often put himself out on that kind of limb.

12:10 p.m.

In spite of all our efforts and in spite of a total understanding that the problem was at that end, there was nothing these people had to work with, given the current legislation in the province. They could have gone earlier in terms of unfair labour practice. However, this a small union, a small unit stretched right across the country. Costs are damn high and they have to take a serious look before they go into those kinds of legal hassles.

This became a cause célèbre. I think it also underlines the point I was making, that you have not only antagonized and divided a community, if that was your purpose, by not having this kind of protection for workers, but also you have probably done more to politicize a hell of a lot of people in Kapuskasing than anything else could have. This case underlines more clearly than any I could ask for the need for this kind of legislation and the need for it to be accessible if we are not going to continue the bloody charade where we have a totally intransigent employer within the current system. If it proved nothing else, Kapuskasing proved that you cannot; it took outside political action to replace that board before we got any action for these women employees.

Mr. Beauregard: There is one other point I would like to add based on my 24 years of experience as a negotiator in the white-collar field. There is a difference between a struggle in a big community and a struggle in a smaller community. A struggle in a smaller community ends up in each person's backyard. That creates problems because it is much more difficult to live with the situation afterwards. We have seen struggles in eastern Canada, Newfoundland and elsewhere where families were divided for years because nobody could come to grips with the situation and resolve it. That is the reason this legislative committee has a moral responsibility in these situations.

Mr. Callahan: Thank you very much for your brief. It is very interesting.

I have a couple of questions. My first question is--if you cannot tell me, perhaps somebody else can--does the Ontario Labour Relations Board tribunal not go on circuit, and if not, why not? There appears to be a question of tremendous cost here. Every other court in this land travels on circuit for that very reason, to provide fundamental justice to people at the least expense. If the tribunal does not travel, I raise the question as to why it does not.

Second, you talk about the Pratt and Whitney strike. Prior to that, I gather it had no first-contract legislation, or did it have it with access preconditions?

Mr. Beauregard: The reason I am more inclined to the Pratt and

Whitney situation is that I am originally from Quebec and I know the labour relations situation. Pratt and Whitney was under collective bargaining for some time prior to that. It is not directly related to first-contract arbitration, but it is a struggle that came about and forced the Quebec government, following bloodshed, that had to be--

Mr. Callahan: I am sorry. I understand what you are saying. I had read the words "to justify this government to act," which meant--

Mr. Beauregard: It meant, should we wait for a situation where there would be bloodshed before we pass access to first-contract arbitration? That is the intent of my comment.

Mr. Callahan: Then the Quebec government did pass first-contract legislation as a result of that?

Mr. Beauregard: It passed first-contract legislation and a number of other pieces of advanced legislation because of that struggle.

Mr. Callahan: The government passed it, but it did not have any first-contract legislation prior to that?

Mr. Beauregard: No.

Mr. Callahan: I seem to recall that Manitoba, and I thought Quebec as well, had first-contract legislation with automatic access, without any preconditions. Am I wrong?

Mr. Beauregard: I believe you are right about Manitoba and wrong about Quebec. We have been involved with a similar organization, the caisses populaires. We have known that organization for years. We have more than 70 of them organized in Quebec.

We had great difficulty in getting access to first-contract arbitration in Quebec. Again, you have to go through the long and costly process of justifying yourself to be able to achieve access to first-contract arbitration. Even if you restrict the period of time in which the board has to render its decision following the issuance of your request or application, you are still going to have tremendous costs involved. It may take days and days of hearings to justify yourself. It is going to be a very costly factor. If we look at the unorganized today, the majority are in the white-collar and retail fields. You are talking mostly of small units of fewer than 150 people. It is going to come at an unbearable cost, and that is my concern.

Mr. Callahan: If we do not already have it through the committee counsel, I would like to request a copy of the piece of legislation in Quebec to see what those preconditions are. You may have gotten them already. I only started sitting on this as we went around this area, so I have not got them. I would like to see them.

Ms. Madisso: Did you want Manitoba's too?

Mr. Callahan: Perhaps even Manitoba's and any others; British Columbia is mentioned in here. I would like to see its too.

You said another thing and I would like it checked by legal counsel, not because I doubt your word in this respect but because it strikes me as a little odd. You said that if the ministry sets up a meeting within the course

of the conciliation procedure and one of the parties does not bother to appear, that is not sufficient either to constitute bad faith or at least to place the onus upon that party to justify his nonappearance and show it is not bad faith.

Mr. Beauregard: Some of the members of this committee may be familiar with my legal counsel. Jeffrey Sack's office is very versed in labour relations. They tell me it is not justification.

Mr. Callahan: I would like that from legislative counsel as well. This is my opinion, not a position of my government: It seems to me if a person does not show up for a meeting and cannot give some reasonable justification, it should reverse the onus to that person to establish that he is acting in good faith.

Mr. Mackenzie: I am not sure we have time for it, but it would be interesting to ask for examples from a number of labour lawyers. The point I have been making all along, Mr. Callahan, is that as long as there have been meetings--and there were a few there--the experience right back to my day has been that it is extremely difficult to prove bad faith.

Mr. Callahan: Yes, but there is a world of differences between the charade of meeting and the absolute, obvious fact of not attending.

Mr. Mackenzie: In cases before the board, I have had other examples that are probably even more startling explained to me by various people, including my own son, who carries a number of them to the board. That is really the sticking point.

Mr. Callahan: Not with reference to this, but there is something analogous in the criminal process. It is the policy of the law that if an accused fails to show up for his preliminary hearing, contrary to what used to be the principles of justice, they proceed with it. One would think this would be similar, unless there is some very rational reason that should not reverse the onus or create a question of bad faith. First, I would like to know whether that is correct. If it is, I would like to know the reasons.

Mr. Polsinelli: Mr. Beauregard, I would like to thank you for your presentation. I believe at least the majority of the members of this committee are thankful that you again highlight the need for this type of legislation. We are all very familiar with the caisse populaire situation; it was a very bitter strike. It would be unfortunate if the bill we have before us did not cover that type of situation and would not grant your union access to arbitration. I believe the test required under this legislation is not a bad-faith test. With my knowledge of the caisse populaire situation, I am firmly convinced the legislation we have before us would have granted you a right to arbitration. Having made those comments, I thank you for your presentation.

Mr. Beauregard: I regretfully say I disagree with you. This management was well guided throughout, since we were certified to the end of that strike. In my view, they were probably walking a tightrope. They never fell off it because they were well guided. For instance, we have had a number of suspensions. They would suspend someone for two days, then they would reverse that suspension and say, "It was continuous harassment." My understanding of clauses 40a(2)(a) to (d) is that if one had to justify to the Ontario Labour Relations Board those four segments--

Mr. Polsinelli: Or one of them.

Mr. Beauregard: --or even one of them--then with good legal counsel, that employer would have been able to avoid being caught in them. That is the problem we are going to have.

Mr. Polsinelli: In your brief, you indicated that you did not want to get into the legality of the legislation. By trying to give a legal interpretation of this section, you are getting into the legality of it. By effectively saying the test is a bad-faith test, you are getting into the legality of what the legislation says.

In my view, that it is not a bad-faith test. In fact, I would suspect you would have qualified the caisse populaire situation with clause 40a(2)(c), which mentions "the failure of the respondent to make reasonable efforts to conclude a collective agreement." That may have given you sufficient grounds to have access to automatic arbitration. I respect your point of view in that you believe the test is a bad-faith test. We disagree on that.

Without debating that, I want to thank you for your presentation and express my opinion that it is not a bad-faith test and that if this legislation had been in place when you were in the process of your strike, you would have been granted access to arbitration. That is the comment I wanted to make without discussing the legality and the wording of the legislation.

Mr. Mackenzie: I want to make sure that Mr. Polsinelli reads the presentations of the Canadian Manufacturers' Association as well as the one from the Tory law firm that was here yesterday, Mathews, Dinsdale and Clark. There is pretty strong evidence that even these people agree almost unanimously with the position that the union movement has put forward. They were not supporting our position.

Mr. Callahan: There is no law firm that is wholly one party. That is not the way it works.

Mr. Polsinelli: Time will tell.

Mr. Callahan: Except my firm.

Mr. Chairman: Mr. Beauregard, you have put your finger on a very controversial part of the bill and one with which this committee will have to wrestle later when we have the clause-by-clause debate. You can be assured that is the very thing we shall be grappling with. Thank you very much for your presentation. It is helpful.

Mr. Beauregard: Thank you. I was very pleased to address this committee.

The committee recessed at 12:22 p.m.

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STANDING COMMITTEE ON RESOURCES DEVELOPMENT
LABOUR RELATIONS AMENDMENT ACT
THURSDAY, MARCH 27, 1986
Afternoon Sitting



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Taylor, J. A. (Prince Edward-Lennox PC)

Substitutions:

Cooke, D. R. (Kitchener L) for Mr. McGuigan
Gillies, P. A. (Brantford PC) for Mr. Stevenson
Polsinelli, C. (Yorkview L) for Mr. South

Clerk: Decker, T.

Staff:

Madisso, M., Research Officer, Legislative Research Service

Witnesses:

From the Ontario Motor Coach Association:

Crow, B. E., President and Chief Executive Officer
Gordon, M., Counsel; with Beard, Winter, Gordon

From the Canadian Paperworkers Union:

Holder, D., Vice-President, Region III
Hunter, M., Organizer
Foucault, A., Representative

From the Board of Trade of Metropolitan Toronto:

McCracken, J., Manager, Legal Department
Dunsmore, R., Chairman, Labour Relations Committee
Clark, G., Member, Labour Relations Committee
Goudie, R., Member, Labour Relations Committee

From the Ministry of Labour:

Failes, M., Policy Analyst, Labour Policy and Programs

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Thursday, March 27, 1986

The committee resumed at 2:11 p.m. in committee room 2.

LABOUR RELATIONS AMENDMENT ACT
(continued)

Consideration of Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: We agreed this morning we would deal with whether to proceed a week from tomorrow with clause-by-clause consideration or to put it off until the Legislature comes back.

Not to prejudice the debate, next Friday a summary of the recommendations by section will be available from Ms. Madisso, who will be doing it, and the comparative legislation that has been requested from the other jurisdictions and any other specific requests that have been made for information. The question before us is whether to sit next Friday to attempt to deal with the legislation clause by clause. Are there any comments or questions before we make a determination?

Ms. E. J. Smith: Will that information be available for us on Friday or shortly thereafter, even if we delay, so that we have a chance to study it?

Mr. Chairman: I think so.

Ms. Madisso: Yes.

Mr. Chairman: What would not be available is whatever happens on Thursday.

Ms. E. J. Smith: Yes. If we get the information later, we can include that. We will have a fair presentation on Thursday.

Mr. Chairman: What is the wish of the committee? At present, the committee is scheduled to sit next Friday but that can be changed; I am not suggesting otherwise. If you want a change, you should put the case.

Ms. E. J. Smith moves that the clause-by-clause debate be dealt with immediately after the resumption of the sitting of the House.

Are there any comments?

Mr. Mackenzie: I just want to state my opposition to that.

Mr. Gillies: Assuming the committee is able to deal with it right after the resumption, I will support the motion.

Mr. Chairman: If I can speak on that, I do not think there will be a problem with dealing with that item first. After the budget, estimates will be referred to the committee, and not until after the budget.

You heard the motion that we initiate clause-by-clause debate when the House resumes and not before.

Motion agreed to.

Mr. Chairman: We will not sit next Friday. I suggest we sit at the earliest opportunity at the call of the chair when the House resumes in April.

Ms. Madisso: May I suggest in that case that the package of information be delivered to you the following Monday? That way I can include Thursday's for you.

Mr. Chairman: Are there any problems?

That having been dealt with, the first group before us this afternoon is the Ontario Motor Coach Association. Mr. Brian Crow on our right is president and Michael Gordon is counsel to the association. Mr. Crow, if you wish to proceed, we would appreciate it.

ONTARIO MOTOR COACH ASSOCIATION

Mr. Crow: My name is Brian Crow, president of the Ontario Motor Coach Association. As the chairman has indicated, Michael Gordon, our counsel, is with me. He will be doing most of the detailing for you today, but I would like to make a couple of introductory remarks and introduce the association.

The Ontario Motor Coach Association was formed in 1930. Our membership is based on 74 bus operating company members, 54 specialized travel and tour members, 36 suppliers and over 725 affiliate members representing different segments of the travel industry. Our members are responsible for intercity and rural bus service in Ontario, scheduled service, charters, tours, bus parcel express and some school bus activity.

Ontario's motor coach industry plays a vital role in the province's transportation infrastructure, providing the sole method of public carriage for a substantial majority of your constituents. Our industry provides service to more than 1,000 communities in Ontario, of which only 42 have public air transportation and as few as 115 are serviced by public rail. Statistics Canada, in keeping track of these figures, indicates that we carry about 1.3 times as many people as rail and air modes combined. I tell you this to give you some indication of the size of our industry.

The bulk of our passengers is comprised of the elderly, the young and the lower-income. Only during rush hours in major centres do commuters become our clientele. What impacts the motor coach industry impacts directly the people and communities I mentioned earlier. We believe Bill 65 will impact the motor coach industry. We believe it will impact the small and medium-sized companies, most of which are family-run and located outside major municipalities of Ontario.

We believe this legislation will increase costs to the carriers involved. The recent insurance crisis has proven that when a carrier's costs are increased, a few things happen: (1) passenger fares increase; (2) jobs are lost; (3) viability of the company decreases; (4) essential services, namely, scheduled services, decrease; and (5) the carrier becomes less competitive with other carriers in neighbouring jurisdictions.

Traditionally, insurance costs make up only three to five per cent of a carrier's operating costs. An increase in insurance premiums is reflected in a fare increase. Please consider now an increase in labour costs, which make up between 50 and 70 per cent of a carrier's operating costs, would impact the industry and the passengers in the communities you represent.

We see no benefits in this legislation that could justify the increased costs to our industry and, in the end, to the public we serve. We are opposed to changing the present methodology of reaching first contracts because the present system works in spite of itself. Most first-contract negotiations have been successful.

Michael Gordon, who has more of the expertise in the labour industry, will carry on from here.

Mr. Chairman: Mr. Gordon, please be seated and relax.

Mr. M. Gordon: I take it that one is permitted to smoke during the course of these proceedings.

Mr. Chairman: Yes, so far.

Mr. Gillies: It is almost mandatory.

Mr. M. Gordon: They being my lungs and now, we understand, yours as well.

Mr. Polsinelli: As long as Richard Johnston is not chairman.

Mr. M. Gordon: Our submissions to you are contained in an extensive brief, some 50 pages long. I do not propose to read it to you. It has been provided to the committee. I suspect, hope and trust you will have an opportunity to read it at your leisure, if you have not already had one. I wish simply to highlight some matters for you that are contained in it.

2:20 p.m.

You will note that the index to the brief itself is two pages long. The contents of our submissions are listed in extenso within the index. A review of the index alone will assist you in understanding our approach. On behalf of the association and its members, we invite you to have reference to that index as I make my comments at this time.

First, I wish to turn to page 2 of the index. There is a typographical error under section 3(B). The reference should be to subsection 40a(15) of the draft legislation. Perhaps you would make that correction, please.

At the commencement of our brief we have engaged in some analysis of the existing certification procedures under the provisions of the Ontario Labour Relations Act. Our purpose in doing that is to highlight an area of the statute which in our respectful view is in desperate need of reform. In those minority of cases where problems have arisen in first-contract negotiations, they are almost invariably traceable to the certification process itself. A simple reform to the existing process would do much to eliminate the problems which cause difficulties in first-contract negotiations before they occur.

We suggest there should be a vote in any event. In making this suggestion to you, we are mindful that a government-supervised vote of employees on the subject of the grant of bargaining rights is the norm with respect to a substantial majority of the employees in North America.

Mr. Mackenzie: Before you continue, can you give us some substantive evidence of the comment that the problem in lengthy strikes relates to the certification procedure?

Mr. M. Gordon: I can give you substantiation to this effect, sir, and it arises to a very large degree out of my own experience as a labour counsel of some 17 years standing. In the first place, if one reviews the statistics that are published on an annualized basis by the Ontario Labour Relations Board, one will find that in most cases certifications are granted without a vote. If one wishes to look at the high-profile cases, the ones which no doubt have been referred to you and have caused problems over the years, such as the Fleck Electrical Manufacturing Ltd. case, the Radio Shack case and other cases of that nature, you will find that in none of those cases was a vote ordered.

In my own experience, I had a most difficult case, which went all the way through to the Supreme Court of Canada, where I won. The first-contract negotiations were almost impossible.

Mr. Mackenzie: What about the fact that there was no vote?

Mr. M. Gordon: I am just about to tell you, sir.

Mr. Chairman: Excuse me. Once you have done that, we should wait until Mr. Gordon has completed his presentation before we get into any further exchanges. Go ahead, Mr. Gordon.

Mr. M. Gordon: Remember that a very significant percentage of employers in this province are Canadian subsidiaries of American parents. The parents, therefore, have the American experience.

When we came to a second contract, there was a decertification application. A vote was ordered. The trade union in the case, the United Steelworkers of America, won the vote overwhelmingly. There was a total change in the atmosphere at the bargaining table from the employer's perspective; it was persuaded that the union was what the employees wanted. It removed all sorts of objections and the relationship between the union and the company has been extremely good in the five years since.

That has been my experience in a number of other like cases. Once the employer is persuaded by that secret ballot vote that this is what the employees really want, a lot of objections come to be removed.

Mr. Mackenzie: It is not hard evidence; it is a view.

Mr. M. Gordon: In any event, we have suggested it is the norm with the substantial majority of employees in North America. As you know, it is the rule in the United States; in Canada it is the rule in Nova Scotia. Although my experience in Nova Scotia has not been that extensive, I have negotiated some agreements there and I can tell you from personal experience the question of the acquisition of bargaining rights has not been an issue in negotiations.

This coincides with experience in Ontario. Wherever there has been a vote and the union wins it, that whole issue of representation, of who speaks for whom, is not an element at the bargaining table. That part of our brief extends from pages 1 through 6.

A second point is that we are opposed to first-contract arbitration as a means of resolving first-contract bargaining disputes. It is our view the proposal is wrong in principle. In the first place, we do not accept that the present methodology of collective bargaining has failed. In this province the present method of reaching first contracts or collective agreements does work. Most first-contract negotiations have been successful.

Other than in a very few high-profile cases which have received notoriety, the data demonstrate that employers and trade unions are normally able to resolve their differences at the bargaining table. The data which are available do not, in our view, support a need for change, and the present unfair-practice provisions of the Labour Relations Act provide more than adequate safeguards for a trade union in protecting its legitimate bargaining interests under the statute.

As an aside on that point, the trade union movement complains of delays within the system now in respect to getting decisions from the board. Of course, the easy answer to that is to increase the manpower of the board, having more vice-chairmen and more people available to hear cases.

In our submission the right to strike is a precious one in a free and democratic society, as is the concomitant right to lock out. The resort to economic force has long been considered the ultimate arbiter of labour disputes in the private sector.

The imposition of first-contract arbitration in the normal case takes away from the employer the right to resort to economic sanction. Is it also suggested the right to strike ought to be taken away from employees? At least in theory, under this legislation, if a union is able to argue that an employer who is bargaining too hard in its view ought to lose the right to lock out, then it seems to us the small employer who complains a big trade union is bargaining too hard may well be able to claim that the right to strike ought to be taken away from the employees.

Of course, if he is successful in that argument, he ends up getting what he does not want anyway, and that is compulsory interest arbitration. That is a bit of a catch-22 situation for the employer.

The other aspect of the equation that is of considerable concern is the record of interest arbitration as a bargaining dispute resolution methodology. We invite you to take a look at what is happening in those sectors where interest arbitration is the method of resolving bargaining disputes. We suggest the record is not a happy one. Our full argument in support of that proposition is found on pages 14 through 18 of the brief.

2:30 p.m.

We are also concerned that the proposed legislation will frustrate the bargaining process itself. Interest arbitration, for those of us who are involved in that process, is the antithesis of collective bargaining. Over and over again when one is involved in a public sector negotiation where interest arbitration is the dispute resolution mechanism, one hears the refrain at the

bargaining table, "If you do not give us that, we will get it at arbitration." That kind of commentary comes to be the substitute for rational and informed discussion at the bargaining table. In my submission, interest arbitration has not been a satisfactory experience of this province, at least not on the basis of the public record. Interest arbitrators have much to do with the fact that there came to be imposed in this province the Inflation Restraint Act.

In the one jurisdiction where first-contract arbitration came to be adopted legislatively, the experience has been sufficiently bad that the present administration in that province no longer refers first-contract disputes to interest arbitration. I am sure the honourable members will appreciate our candour in our brief. We admit that we are not sure whether that is occurring because of the philosophical bent of the present administration in British Columbia or because of past experience with the particular vehicle.

We urge that you review with some care that portion of our submission from pages 19 to 22 dealing with interest arbitration and how it frustrates the bargaining process. If this committee is able to do it, we suggest that you meet with conciliation officers and mediators employed under the aegis of the Ministry of Labour, have your discussions with them, talk to them in camera and hear what they have to tell you about their success as mediators and conciliators in those cases where interest arbitration is the dispute resolution methodology.

I suggest it be in camera because those gentlemen are placed in a most difficult position. They cannot be placed in a position where their neutrality can in any way be questioned. If they can talk to you in camera, they can talk freely. I think this committee will benefit from their enormous experience.

We are also concerned that the proposed legislation will have the effect of tipping the bargaining scales and ultimately bringing an end to free collective bargaining as we know it. Given what the courts of this province have had to say in the well-known Broadway Manor case and given what they have had to say about free collective bargaining, it seems to me that as legislators you cannot lightly bring the process of collective bargaining to an end.

On page 24 of our brief we discuss the dangers of interest arbitration as a methodology of dispute resolution in the private sector. In the first place, there is a substantial lack of information-gathering systems in the province right now. In the hospital industry we had Professor Johnson who made very substantial suggestions for gathering information to compare jobs in that industry. His suggestions were never adopted, apparently because it was extremely difficult to implement his proposals.

If it is difficult in the hospital industry, I can only speculate how difficult it would be to do that for the private sector as a whole in this province. In case after case the Ontario Labour Relations Board has expressed a concern that it and its processes not be used by one of the parties to a set of negotiations as a club to beat an agreement out of the other party. This legislation may well do that.

Finally, it has been suggested that some employers have been engaged in stonewalling in first-contract negotiations. It is our respectful submission that the facts demonstrate that the so-called stonewalling is an exception to the rule and that the OLRB has been perfectly capable of rectifying the situation if, as and when it has occurred.

Beginning on page 29 of our brief, we undertake an analysis of the draft legislation. The analysis is made in the alternative and it assumes that you reject our earlier submissions. We make some suggestions to you for improvements to the proposed legislation.

The first section of this part of our brief deals with subsections 40a(2) and 40a(15). It is our submission that there ought to be only one test for access to arbitration and that it be good-faith bargaining. We urge that on you because, in adopting that test, we are then dealing with an enormous body of known jurisprudence. Lawyers, trade union representatives and labour consultants at least have some chart of the waters they will be going through under this new legislation. In our respectful submission, that is necessary.

In subsection 40a(15) of the draft legislation, the factors to be considered by the arbitration board, if one is appointed, leave much to be desired. Surely it is not proper to have a board of arbitration sitting, in effect, in an appellate capacity on the Ontario Labour Relations Board. That is what the legislation proposes in one of the sections.

We suggest to you that there be specific legislative guidelines given to interest arbitrators. Surely the ability to pay as well as the potential for devastating economic impact on employers ought to be factors taken into consideration. One of the problems under the present Hospital Labour Disputes Arbitration Act is that there are really no guidelines for the arbitrators on what they have to take into consideration to reach a decision. Indeed, the only guidelines that arbitrators under that legislation have received have been of recent vintage under the Inflation Restraint Act.

Beginning on page 41 of our brief, we deal with the topic of the selection of arbitrators. In our view, the Ontario Labour Relations Board ought to act as the arbitrator, except in circumstances where the parties voluntarily agree to a private arbitrator or private arbitration board. In our submission, in no circumstances should a private arbitrator be imposed on the parties to a bargaining dispute.

Further, we deal with a perhaps delicate subject, but we are of the view that vice-chairmen of the Ontario Labour Relations Board should be prohibited from sitting as private arbitrators in first-contract arbitration disputes. We suggest there is a potential for conflict of interest and we ought not to be placing members of an administrative tribunal in a position where they can gain a substantial secondary source of income by reason of arbitrations which are brought under this statute.

If these gentlemen need to have that extensive secondary income, perhaps the government ought to be looking at what they are being paid and raising their salaries. We do not believe they should be utilized for the interest arbitration purpose. If you have more concerns about that, it begins on page 41 of the brief.

On page 45, we draw your attention to our concerns that subsection 40a(11) of the legislation as proposed overrules what is now section 73 of the Labour Relations Act. Section 73 of the Labour Relations Act is the so-called right-to-return-to-work provision during the first six months of the strike, if a strike occurs. You will find our specific submissions on this point on pages 45 and 46.

On page 46 of our brief, we draw your attention to the potential for wage rollbacks in subsection 40a(13). Finally, our conclusions are summarized on pages 47 and 48.

In conclusion, Mr. Chairman and honourable members, we invite you to read our submissions and weigh them against other information and material which you have received or which has been presented to you. If you have any questions of me, I will be glad to try to answer them for you.

2:40 p.m.

Mr. Chairman: Thank you. It is obvious you have put some thought and work into the submission. The committee members appreciate it. Are there any questions of the Ontario Motor Coach Association?

Ms. E. J. Smith: I was struck by the contrast between what is presented on pages 30 and 31, as to what is sufficient to consider that a trade union is not being recognized and bargained with, and the Kapuskasing case that was presented just before we broke, where management's absolute refusal ever to meet was not taken as bad faith. This does not really relate to this bill; it relates to bad-faith bargaining. I just noticed the contrast; that is all I can say.

The case that was presented this morning actually showed how difficult it is to get a ruling of bad-faith bargaining. In the case in Kapuskasing, even though the employer absolutely never appeared they could not find a case of bad-faith bargaining. I am obviously going to have to pursue this in my own way because it does not really apply to this as much as the overall labour law.

Mr. Mackenzie: That was a directive meeting. It was not that they had not had meetings.

Ms. E. J. Smith: Pardon?

Mr. Mackenzie: There were meetings between management and the union on a number of occasions. The meeting they did not show up at was a directive to appear and, in effect, when the ministry sent in--

Ms. E. J. Smith: I could not understand why it would not establish grounds of bad-faith bargaining if you sent up provincial people to negotiate and they told management to come in and management did not appear.

Mr. M. Gordon: They are two different situations. If an employer refused to meet at conciliation, that employer clearly would be in violation of the statute and in some difficulty. On the other hand, if it is at the mediation stage under the statute, and it is a voluntary stage, one does not have to meet. I can tell you that as an employer lawyer, as a matter of practice I will always meet at mediation because I do not want to give my friends on the other side any opportunity to point at my client and say, "You are refusing to bargain."

There are circumstances with which I am familiar where parties have gone through an extensive bargaining process, are at the mediation stage and the question is asked, "Has the other side changed its position since the last time we met?" If the answer to that question is no, it may very well be that the other party, either union or employer, will say, "What is the point of my meeting?" That is part of the bargaining dynamic.

Although I have not read about the Kapuskasing case, I suspect that kind of thing was within the OLRB's contemplation when it made its decision. I am sure the board could not have made a decision of that nature at the conciliation stage.

Ms. E. J. Smith: That answers my question.

Mr. Polsinelli: For how many years have you have been practising law?

Mr. M. Gordon: I got my call in 1969, sir.

Mr. Polsinelli: We are looking at 17 or 18 years.

Mr. M. Gordon: Yes, sir.

Mr. Polsinelli: In what area do you practise? Is it strictly labour law?

Mr. M. Gordon: Yes, sir.

Mr. Callahan: I was just going ask whether you have your QC.

Mr. M. Gordon: I will tell you, sir.

Mr. Callahan: Never mind.

Mr. Chairman: Mr. Callahan, stop teasing the witness.

Mr. Polsinelli: I want to thank you for a very elaborate presentation. As the chairman indicated, it was quite thought provoking. It is quite clear that from your perspective the only test for access to arbitration should be the bad-faith bargaining test.

Mr. M. Gordon: Yes.

Mr. Polsinelli: Obviously, by preparing such an elaborate presentation for this committee, you must feel the legislation does not provide a bad-faith bargaining test.

Mr. M. Gordon: It does in clause (b), if my memory serves me.

Ms. E. J. Smith: Clauses (a) and (c) are purely bad-faith bargaining. Clause (b) is the one we are talking about.

Mr. M. Gordon: I am sorry; clause (c) is the one. In clause (b), I am not sure what that means, "the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification."

In my own experience, all sorts of uncompromising positions have been taken on both sides of the bargaining table, but when we got down to the strike deadline and there was half an hour to go, they were not uncompromising any more.

Mr. Polsinelli: Perhaps I should rephrase my question. Clearly, if an employer were bargaining in bad faith, he would have access to arbitration. In your opinion, does the legislation provide for something less than a bad-faith test for access?

Mr. M. Gordon: It would appear to in both clauses (a) and (d).

Mr. Polsinelli: I guess I have made this speech on a number of occasions, and unfortunately Mr. Mackenzie is not here to hear it again--

Ms. E. J. Smith: Yes, he is. He is behind you.

Mr. Polsinelli: Is he here? The government, through cabinet, has made a policy decision that the test for access in this legislation should not be automatic access and that it should not be limited solely to a test of bad faith. I guess you would agree that this legislation could provide a middle road where the test is neither automatic nor necessary to prove bad faith to get access to arbitration.

Mr. M. Gordon: Let me be very candid with you and tell you that the farther you move away from bad faith as a test, the more delighted members of my profession will be. I cannot be blunter than that. We know what bad faith is; it is very hard to get around what is already there in the jurisprudence and the precedents. Let me look at clause (a). Those are uncharted waters, and whenever there are uncharted waters that means a proliferation of actions involving lawyers arguing what it is the Legislature meant; it is a gift.

Mr. Polsinelli: I am not disputing that. The Charter of Rights does the same thing but I do not think anybody is saying we do not need a Charter of Rights.

Mr. Taylor: I do not know about that.

Mr. Polsinelli: This is perhaps not a fair analogy. The fact that it may provide work for lawyers does not mean we should not have the legislation. The only point I was trying to make was that the test for access to arbitration in this legislation, and I guess you have confirmed that in your opinion, is something less than a bad-faith bargaining test.

Mr. M. Gordon: As it is now drafted, yes.

Mr. Polsinelli: Thank you. That is my point.

Mr. Chairman: Mr. Gillies.

Mr. Gillies: Thank you, Mr. Chairman--

Mr. Mackenzie: There are now splits in the legal community and in the CMA. You will notice that.

Mr. Polsinelli: Lawyers are trained to argue out of both sides of their mouths. It is the whole nature of advocacy in the profession.

Mr. D. R. Cooke: Thank you for that piercing observation on the legal profession.

Mr. Chairman: Try again, Mr. Gillies.

Mr. Gillies: Actually, Mr. Polsinelli asked part of what I would like to get at. Mr. Gordon, if we can assume that this committee is not going to recommend unfettered access to the process and, as I believe is the case, that most members of the committee are not happy with the current drafting and the rather vague four points we are faced with, can you suggest a reworking of this that may go part of the way in meeting your concerns and at the same time be a heck of a lot more easily interpreted by the people who have to use this act?

Mr. M. Gordon: On page 33 of our brief, we have made it very simple. We have said there should be--

Ms. E. J. Smith: That is bad faith. We are looking for the position between.

Mr. M. Gordon: We are suggesting on page 33 that the test be the failure of the respondent to bargain in good faith and make every reasonable effort to make a collective agreement.

Mr. Gillies: That is section 15.

Ms. E. J. Smith: That is bad faith.

Mr. M. Gordon: That is section 15, and that is clear.

Mr. Gillies: What would you do with subsection 40a(2) then?

Mr. Callahan: Why has it not worked up to this point?

Mr. M. Gordon: With the greatest respect, I think it has worked.

Mr. Callahan: Has it worked as first-contract legislation?

Mr. M. Gordon: No, I am sorry. There are very few cases in which the Ontario Labour Relations Board has in effect imposed the terms of the first agreement. Devilbiss is one, if my memory serves me. One can only speculate why it was that at the end of the term of the first agreement for Devilbiss, a successful decertification application was made. As I speculate on that, it takes me right back to the beginning: the employees did not want it in the first place.

Interjection.

Mr. M. Gordon: I agree, and I have said I am only speculating. We cannot know. In fairness, my friends in the trade union movement--and I use that word advisedly because I am dealing with them as friends all the time across the bargaining table--often disagree with me, but they will probably tell you the reason employees chose to decertify the trade union was that the employer was behind it. The employer will tell you he did not have anything to do with it. The truth, as in most things, is probably somewhere in between. All we have is the evidence. There was no evidence of employer inspiration.

With respect to the good-faith test, the board is given enormous powers and has imposed very substantial penalties. Was it K mart or Radio Shack where the labour board imposed a fine? The company appealed, and the Court of Appeal upped the ante to \$550,000. That is no mean fine. I believe any responsible counsel, in advising the employer, indicates that statute has very substantial teeth in it for the recalcitrant employer who is in violation.

Mr. Callahan: Are you saying not to put anything in there at all; section 15 is good enough to cover the waterfront?

Mr. M. Gordon: That is my belief, yes.

Mr. Callahan: If section 15 is good enough to cover the waterfront, what are we all doing here? We have heard about reams of cases that were probably on a par with Radio Shack and nothing was done or there did not appear to be any first contract enacted as a result of section 15.

Mr. Taylor: That was the accusation.

Mr. Callahan: They gave us some specific examples. A couple of them were absolutely atrocious. We heard about one in London.

Mr. Chairman: Regardless of the example, the fact is the legislation is before us because somebody thought the bad-faith test was not adequate. That is why we have this legislation; so the committee has to grapple with the question of where to draw the line.

Mr. M. Gordon: That is correct, and I have recognized--

Mr. Chairman: You are taking us right back to where it has always been.

Mr. M. Gordon: We have made our submissions to you to take you back to the beginning. We have recognized that we are unlikely to be successful in that effort, and we have concentrated on the legislation as it is now and made some suggestions for amendment.

Mr. Callahan: That is further and other relief. That is just.

Mr. D. R. Cooke: Mr. Gillies's question was, are you prepared to draft a new subsection 40a(2) that will come halfway between and do what we want as opposed to what you want?

Mr. Taylor: Do not include me.

Mr. M. Gordon: I think the committee should find out my hourly rate before it makes a proposal.

Mr. Chairman: We assume it is outrageous.

Mr. M. Gordon: Being a lawyer, I might try to extra bill.

Mr. Gillies: Mr. Gordon, I just asked whether you had any thoughts. I am not for a minute suggesting that your position is not legitimate or that you should want to redraft subsection 40a(2). It is just that, as the chairman indicates, we are trying to come to grips with it as much as possible. This is the most contentious part of the bill, and we are trying to come to grips as much as possible with something that will satisfy the most parties, do the best job and be the most readily understood to stand as part of the bill. That is why I asked.

Mr. M. Gordon: If I may assist you on that, one of the advantages of the bad-faith test is that prima facie evidence of bad-faith bargaining, in my view, would include violations of the statute. For example, there are all kinds of areas under other sections of the statute. Suppose the employer changed working conditions in the middle of bargaining. That is clearly a violation of the statute. I would assume the Ontario Labour Relations Board would take that and say that, in and of itself, is evidence of bad-faith bargaining, as it has done in other cases.

A lot of safeguards are there, and part of the problem under the existing system, if there is a problem, may be that the labour board is understaffed in terms of the numbers of vice-chairmen it has available to it. There is a problem getting hearing days and hearing dates in a long case.

Mr. Gillies: In effect, you are saying that while you want the bad-faith test, you would have no problem with a legislated definition of "bad faith," which might be broader than is generally accepted now, such that other factors could be taken into account, but you would want them under this umbrella of bad faith.

Mr. M. Gordon: Yes.

Mr. D. R. Cooke: My question is supplementary to the last two questions to some degree. Steven Wilson of Mathews, Dinsale and Clark made a submission yesterday on behalf of his firm. I do not think he intended to do this, but he left us with the impression that he would be prepared to argue before the Ontario Labour Relations Board that subsection 40a(2) basically means bad faith as it is written. That is a submission we have had from a number of labour unions.

Mr. M. Gordon: I am not prepared to go that far, because clauses 40a(2)(a) and (d) are not clearly bad faith. Clause (a) refers to "the refusal of the employer to recognize the bargaining authority of the trade union;" I do not know what that means. There is so much of that. It may just be the question that one bargainer does not like the other and says, "I do not want to talk to you."

In my own experience, I have deliberately removed myself from negotiations and advised my client to use someone else because I could see that the fellow representing the union and I did not like each other. It was in my client's interest to have someone else because there is so much chemistry involved in that process.

The refusal of the employer to recognize the bargaining authority of the trade union is a very difficult concept. You heard Mr. Wilson say yesterday that he can argue out of one side, and I will go back to argue it out of the other.

Mr. D. R. Cooke: What about clause 40a(2)(b)? He had problems with clause (d) as well. Forgetting about clause (d), what about clause (b)? Would you be prepared to argue that it simply means bad faith?

3 p.m.

Mr. M. Gordon: No. The problem in clause (b)--"b" as in bad--is the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification. That goes beyond bad faith and opens up something of a Pandora's box. Does that mean you can take an uncompromising position if you have reasonable justification? What might reasonable justification be? That is good for four or five days' evidence and argument on top of it.

The easiest example you have is what is now section 89 of the Labour Relations Act. I believe any competent, candid labour practitioner on either side of the labour-management fence will agree that amendment to the statute caused an enormous proliferation of cases before the board and extended the length of hearings. That is the reverse onus section. The length of hearings was quadrupled because you do not dare not to call a witness. In cases in which you would have called two or three witnesses before, you are now calling a dozen. That is one of my concerns about those two clauses in 40a(2).

Ms. E. J. Smith: Mr. Cooke asked part of my question. I am restating Mr. Polsinelli's point. We are trying to change and broaden. You said you

think possibly we should broaden the definition of bad faith and resolve it that way. We have heard before that we are opening up the need for more jurisprudence to look back to; otherwise, we are creating a need for new cases, which I completely accept. If you bring in a new law, you bring in a new history to be created. If you broaden the definition of bad faith, then you do that for the whole Labour Relations Act rather than for first contracts only.

Mr. M. Gordon: As I understood the question, which I think came from Mr. Gillies, he asked whether would I have any objection to there being a somewhat more careful legislative definition of bad faith.

Ms. E. J. Smith: I think it was Mr. Cooke and he talked about broadening the definition.

Mr. M. Gordon: In any event, I assume from that we would get a section that would not tell us what bad faith means but would say something like, "'Bad faith' includes...."

Ms. E. J. Smith: Recognizing that this legislation is in front of us because we wish to go beyond bad faith in the case of first contracts, there is a deliberate intention in this bill to say that in first contracts we will go a little further to try to bring a contract into being because people are inexperienced.

Mr. Mackenzie: When you say "beyond bad faith," do you mean tougher than bad faith or modified bad faith?

Ms. E. J. Smith: Less tough. Modified bad faith.

It opens up new histories to determine what that means. Hence Mr. Gillies's question to you was: "Do you have anything that could help us define this area we want to apply only to first contracts which allows something broader or narrower, depending on what you are talking about, but allows a little more leniency beyond bad faith?" The negatives and positives. You know what I mean.

Mr. M. Gordon: The only known standard at the moment seems to be bad faith. What is included within bad faith may well be extended. For example, the small contractor may have a trade union representative arrive on his doorstep and say: "Here is the master contract. Sign it." The guy says: "I do not know what it is. I want to read it. I do not want to sign it." The rep says, "Sign it or you guys are off the job." That happens. The fellow says, "I want to have some changes there to reflect my little wee contracting company." The rep says, quite properly: "That is the agreement. Sign it." Is that bad faith?

Ms. E. J. Smith: I want to assure you that in all these hearings we have been looking as closely at the smaller employee with the big union as we have at the reverse. Your example of an overweighting of power is something, whichever side has it, we are looking at and trying to deal with.

Mr. M. Gordon: The catch 22 in my example is that if the small employer is able to establish that the union has engaged in bad faith the first time round, what is his remedy? His remedy is to go to interest arbitration, and any responsible counsel is going to tell him: "You are out of your mind to go to interest arbitration. You are going to get killed."

Ms. E. J. Smith: Now you are discussing whether the arbitration process is fair, and that is a separate subject. Also, I point out to you that construction is not under this bill.

Mr. M. Gordon: Sure it is.

Mr. Taylor: The basics are in a package; they do not occur separately.

Ms. E. J. Smith: I know that. I just wanted to say that because I--

Mr. M. Gordon: This will apply to the construction industry sections of the statute, unless you exempt it specifically.

Ms. E. J. Smith: It is exempted; that is my point.

Mr. M. Gordon: Is it? I am sorry.

Ms. E. J. Smith: I wanted to make that point for personal reasons.

Mr. Gillies: It is in subsection 40a(18). Although that subject has not come up, I understand--

Mr. M. Gordon: That is not in my copy. I am sorry; I am wrong.

Ms. E. J. Smith: I wanted to make that clear to you for my own sake.

Mr. M. Gordon: Thank you. I appreciate that.

Mr. D. R. Cooke: I want to indicate that Mr. Gordon is still the fascinating person and student of the law that he was when I knew him in law school in the 1960s. I certainly appreciated his brief in particular; it was well done.

Mr. Callahan: Can you tell us more about him?

Mr. D. R. Cooke: I can, and I will later.

Mr. Gillies: He speaks very highly of you too.

Mr. Chairman: Mr. Gordon and Mr. Crow, thank you very much for your presentation. It is truly a magnum opus and the committee will be examining it in more detail.

Interjection: Magnum what?

Mr. Chairman: My legal training gives me these kinds of phrases that roll off the tip of my tongue.

Mr. Crow: Would you prefer copies of our opening statements? They were not included in the brief.

Mr. M. Gordon: It is just a summary.

Mr. Chairman: Yes.

Mr. Gillies: Mr. Chairman, on a point of order: The question of the construction industry came up again. I contacted the people who were in touch

with me and apparently Mr. Minsky, who is appearing next Wednesday with International Union of Operating Engineers Local 793, is going to be addressing the concerns of the construction industry.

Mr. Chairman: Thank you. The next presentation is by the Canadian Paperworkers Union. Mr. Holder is here, I see, and Mr. Foucault and Mr. Hunter. We welcome you gentlemen to the committee and appreciate the fact that you have taken the time and interest to prepare a brief for us.

CANADIAN PAPERWORKERS UNION

Mr. Holder: We are very pleased to have the opportunity to appear before you. André Foucault is on my right and Mike Hunter is on my left. I was going to read my presentation, but I saw Mr. Gordon make his. Rather than read it all, I will try to follow that format, commenting on the main points we see in the act. I recognize that Mr. Gordon is now a friend of ours; I imagine that is because he makes a good living with labour and without it he would be in trouble.

Mr. Taylor: We could all say that.

Mr. Holder: I think there are other parts of legislation work that do not relate directly to labour; you probably will continue to have your jobs.

3:10 p.m.

We are from the Canadian Paperworkers Union. We are here today to speak to you about automatic access. Our union covers 65,000 people in Canada and roughly 20,000 in region III, which relates directly to Ontario. I am the vice-president of the region, which covers Ontario and Manitoba. We cover a large section of converting. Converting deals with school supplies, etc., as you will see in our brief, and with a large number of small units. We believe in the collective bargaining system and we do not want it altered. What we do want is a fair voice for small units in the act. In our presentation we talk about time delays, which are very costly for the union and its members in trying to obtain a first-contract agreement.

Our union does not have bloody flags to lay before the committee, major examples of major battles on the picket lines of first-contract fights. We are an old, established union. We have been a Canadian union for 10 years. Before we were a major mover in organizing, we were well established in plants that were organized years ago. We have got into a large organizing scale in Canada in the past 10 years. At our end of it we find long, frustrating delays in trying to reach a first agreement. Many times it reaches the point of no agreement and decertification after a year, without ever getting an agreement for those people who join the union. In our campaigns, the average group we organize is around 70; they are small units.

We have a unit called W. H. Smith, which will have been organized for one year this coming July. It has been eight months, and we are nowhere near a collective agreement with that company. We are now trying to find ways and means to bring them to the bargaining table to bargain in what we would consider to be good faith. We have all kinds of articles and so forth that W. H. Smith, which has just purchased Classic Bookshops, now is planning on merging the two operations into one. There have been articles about their president in the newspapers. Of course, Classic has not been organized, does not have a union and we have not been able to make an inroad; so the move by W. H. Smith will be into the nonunion section, which will circumvent any hope of getting a collective agreement there.

People do not join unions to end up being intimidated out of a first agreement or to end up on strike. We do not organize people to take them out on strike. We organize them, after making contact with them, because they want a union, want proper representation and want to be able to present their arguments to management. We are not able to get that type of representation in our organizing and trying to get a first collective agreement.

We want to talk directly about automatic access. We have been following the committee's work and reading some of the presentations. We know what is coming down on both sides. We do not see automatic access as something that should be feared in the legislation. The Manitoba experience is published and well documented. It has been in effect for four years. Everyone is not running for automatic arbitration. Because the legislation is there, there is a serious effort to make both parties sit down and bargain in good faith.

At present in the Ontario legislation there are two places that have automatic access. One is arbitration. The new Arbitrations Act has automatic access. It has a time period; it is 21 days to automatic. Experience shows that 75 per cent of the applications for that act are settled before they get to arbitration. I think that has proved what we are saying. Automatic access will make the parties sit down and bargain. It will stop the company lawyers from staying just within the fringes of being in bad faith. They know where the level of bad-faith bargaining is, the cutoff point, much better than most unions.

Unions such as ours do not have lawyers on staff. None of our representatives or organizers is a lawyer. We have to take what is in front of us, read it and try to understand it. Although the present legislation does not clearly state it, we believe it says you have to prove bad-faith bargaining. That is where it is going to come down. It is going to be extremely costly and, in our opinion, we would be better off without the legislation.

Ontario history shows that if we have to prove bad-faith bargaining, we may as well not have an act because we are not going to gain anything from it. It is that simple and that clear. If there is a feeling--and there must be--that this legislation has to be altered then, as someone said earlier, why are we sitting here? We would not be sitting here if we did not feel there was a need for first-contract legislation. I do not believe bad-faith bargaining is the solution to qualify for it. I do not believe the Eaton's situation would have qualified under the present legislation.

Going back to automatic access, there are no conditions which apply to an employer taking a vote on a final offer, done very quickly and up front. Subsection 40a(1) has no conditions. It is clear and precise. It is not used to beat either side to death, and I think the record shows that. I do not believe this committee or the government should be fearful of giving us automatic access. It is now in two sections of the act, and in both sections I believe it has done the job it was meant to do.

I do not believe the unions in Ontario are asking, and we are not asking, for first-contract legislation with automatic access to do away with collective bargaining. That is not the position of our union or the labour movement in Ontario. We believe in collective bargaining, that the best agreement is reached between the two parties. The previous presenter talked about the small contractor who is nailed with the labour agreement. We are nailed many times by the same lawyers, and a similar incident is with W. H. Smith where we are trying to get an agreement. We are running close to the one year when we can be faced with the decertification application.

We met on March 3. The next meeting date the lawyer is available is April 4--one month and one day. He asked us to mail him the submission. Would that be bad-faith bargaining? They can keep us going for ever on that type of thing and the situation becomes impossible.

If you take the Manitoba section and the experience of its legislation, it is running about 50-50. Not everyone is getting binding arbitration to settle the first agreement. If there were 20 cases, and I forget the exact number--

3:20 p.m.

Mr. Hunter: You may know that in Manitoba between 1982 and 1985 there were 174 certifications. Of those, 20 resulted in applications for an arbitrated settlement. Ten of those 20 were resolved by the parties after having applied. Of the other 10, one was somehow thrown out for technical reasons and the other nine were resolved by an imposed settlement. I do not think the Manitoba experience really speaks to rampant use of the act simply because the parties--I am not going to judge their reasons--favour an agreement which is arrived at between the parties, as we would. The homemade one is the best. It is only in cases of absolute necessity that recourse to this provision of the act would take place. There is no question about that.

The Manitoba experience speaks clearly to it. The people in Manitoba are no different from the people in Ontario. They are Canadians, working people and management and they approach labour relations in a similar fashion. The track record of the legislation in Manitoba should encourage Ontario to give us what they have, which is automatic access.

Mr. Holder: Of all the first agreements our union has had in the past couple of years, where we have had large major units with large companies that we already had organized, we have had no difficulty getting a contract. However, you have to keep in mind that we are dealing mostly with smaller units. In the smaller units dealing with independent companies, there are very few cases where we have not had discharges. This was spoken to in the previous brief. We then have to file a section 89, which causes another long delay and starts to interfere with the collective bargaining. It is a form of intimidation of the people that have certified and want a union in this province. The delays in the process that take place leave that threat hanging.

It is a very frustrating procedure. That is why we say today that we should deal with automatic access in the same manner as in the other sections of the act and in the same manner as in Manitoba. If it is clear and precise, then it will allow both parties to sit down and reach an agreement. I do not believe that we as a union will automatically take the approach: "To hell with it. We have arbitration out there. We are going to apply for it." That is not our approach.

As a union, we are not about to give away our collective bargaining rights--not now or at any time in the future. We are not prepared to give it up. However, when we do run into legitimate difficulties in collective bargaining, we have to have the legislation to protect those people. We believe that has to be through automatic access. If it were done through bad-faith bargaining, it would make the legislation useless. It is there in the act now and it does not serve its purpose.

Our union also does not believe that it should automatically go to arbitration with automatic access. We believe it should go to the Ontario Labour Relations Board, and if the two parties mutually agree to go to outside arbitration, then it will go to outside arbitration.

We also agree with the United Steelworkers of America's submission to you. Its amendment to subsection 40a(15) said: "In arbitrating the settlement of a first collective agreement under this section, matters agreed by the parties in writing shall be accepted without amendment, and account may be taken of all matters the board or board of arbitration considers relevant to fair and reasonable terms and conditions of employment under collective agreements."

It would not be constructive nor in the interest of a fair agreement if the Ontario Labour Relations Board or board of arbitration were to allow the behaviour of the parties to influence the contents of the arbitrated settlement. There is no room for punitive measures to be reflected in the final outcome of the process.

It is necessary to have that amendment in the act, and we ask the committee to also give that its consideration. We would be glad to answer whatever questions the committee might have.

Mr. Chairman: Thank you, Mr. Holder. You have addressed a couple of the more contentious problems the committee will have to wrestle with when we come to dealing with the proposed amendments. A couple of members have indicated an interest in asking you some questions.

Mr. Gillies: We really appreciate your presentation, Mr. Holder. I have just two questions. You made a point in your brief about the possibility that, after a party has made a request that the dispute go to the arbitration process, there could be an intermediary step whereby the board would see if it could resolve the dispute before rendering a decision under subsection 40a(2).

Mr. Holder: We are saying we should have automatic access, and the board would settle the dispute and act as the arbitrator, unless both parties agree to go to an outside arbitrator.

Mr. Gillies: I am sorry, I am a little confused. Is this an extra step or are you saying that it would go to the board unless there was a specific request within the terms of the arbitration process that it go to an outside arbitrator?

Mr. Holder: It will go to the board unless the parties--

Mr. Hunter: It basically reverses a procedure which is called for now. It is doing the opposite.

Mr. Gillies: I have got you. So it is not an extra step at all. It is just a switch of that provision.

I want to ask you one other thing. We have heard a lot of positive comments about the Manitoba experience, especially from the labour groups that have appeared. However, somebody who approached me yesterday said he felt that in the long run the disposition of the Eaton's case in Manitoba may not have been a benefit. I do not know too many of the ins and outs of that case. I wonder if you can tell me anything you know about this. I am told that the

arbitrator in that case gave a settlement that was in excess of what either party requested and, as a result, Eaton's has closed down part of the store and laid off workers. Is that the case or are you aware of that?

Mr. Holder: I am not aware of that. I have not heard that they gave in excess and are closing down the store. The last I heard was that they are negotiating again for the second collective agreement.

Mr. Gillies: I will check it out. I thought you might be aware of that as you cover Ontario and Manitoba.

Mr. D. R. Cooke: May I respond to that? If that did happen--and I confess total lack of knowledge about it--that would be an indictment of the arbitrators in Manitoba, not the process. That is something we find ourselves faced with at times, even in grievance arbitration. The previous presenter was involved in a case from the company standpoint where an arbitrator came down with a decision based on a rather contentious and fundamental contract clause which neither of the parties could live with. We recognized that and we worked it out. That is all part of the system.

If that were the case in Manitoba and the award was disastrous from the economic standpoint of both parties, that is not an indictment of the procedure of applying for arbitration.

Mr. Gillies: No, I did not mean to suggest that. However, we have had a number of presentations, mainly from the management point of view, saying that under subsection 40a(15) there should be an ability-to-pay clause.

Mr. Holder: With regard to the subsection on the ability to pay, I ask any of you--and I realize you are not union organizers; maybe you were at one time or another--to name one union in this province that goes out to organize with the intent of putting the company out of business. Organizing is not done cheaply. Our society just does not lend itself to doing something cheaply.

What would be the purpose putting the company out of business? We would not have the membership, the per capita or anything else to further organize and so forth. If the key is the ability to pay, I know of no union that would deliberately go out to shut places down. If I am organizing, or if Mr. Hunter is going out and organizing a place with fewer than 70 people, I do not know what would be the purpose of shutting it down.

We organize many small unions. You have said Eaton's shut down part of the store. In our opinion, we are pretty sure we could not win a bad-faith bargaining case or we would have laid charges already against W. H. Smith. Because it has bought Classic Bookshops and they are now going to merge, we know the movement is going to take place before we have a first agreement, although we cannot prove it. The publicity will be that the Canadian Paperworkers Union put W. H. Smith out of business. We did not put them out of business. They bought Classic. There is a long article from their president saying he now has to rationalize the two companies. He is not going to rationalize to where the union is. That has not happened.

Mr. Gillies: What will that corporate takeover do to your case? Will it derail it? Where will you be?

Mr. Holder: At present, it has taken a month to get one date. They now have offered us another date. I was just going through my brief. I have marked down that we are going to meet them again on April 1, and their lawyer has offered us a second date of May 4. The information we have--and we are trying to confirm it--is that they will move their warehouses into Classic Bookshops in the early part of June, just before they are eligible for decertification.

Mr. Gillies: Is Classic organized?

Mr. Holder: Classic bookstores in Quebec are organized; they are not organized in Ontario. We are talking about the warehouses. In Quebec, the stores are organized, and they are all on strike by an independent union.

Mr. Mackenzie: The strike at the Irwin Toy unit was because after the board decision it moved a good deal of its operations to the other Irwin plant here in Toronto. It never did get back the activists. That is just about down the drain now.

Mr. Holder: We take pride in being a union that wants to negotiate without third parties, and I think all unions do. In our experience, the automatic access to the first vote and the automatic access to speedy arbitration have improved the conditions where we were having extreme difficulty. For a number of reasons, both those things came up. It has been proven they are not working to the disadvantage of either side.

Management, which has automatic access under the final vote, was very fearful of our getting some minor change in the Labour Relations Act for getting that. It has not worked that way; it has worked to the benefit of both parties. We believe automatic access in this first-contract legislation will make both parties sit down and bargain seriously. If what you say is true in Manitoba--

Mr. Gillies: I do not know whether it is.

Mr. Holder: --then for nothing else, both parties will negotiate, because if the arbitrator can give you more, he can also give you less. Therefore, both parties are still going to try to reach their own agreement. That is what the clear road to automatic access will give. It will give the strengths to both sides to know they had better do their job in-house, because if they go out of house, they are subject to change.

Mr. Gillies: I have one final question. Mr. Evans, the director of the United Food and Commercial Workers International Union, was before us yesterday and made a very strong case for automatic access, as you have. He went as far as to say he would rather have no legislation than this as it is drafted here. Can you comment on that?

Mr. Holder: I think I have touched on it briefly. Our union is organizing strongly in a lot of small units, and we know what bad-faith bargaining is. We have laid many of the charges; we have gone through half the route and never completed them. It has been nearly a total loss. As far as we are concerned, if the legislation remains exactly the way it is, it is not going to serve the purpose; it is going to be a disservice. All it is going to do is give a field day to lawyers. We do not believe any legislation should be written in that manner; so we are not in favour of it staying the way it is.

Mr. Gillies: So you agree with Mr. Evans; you would rather have nothing.

Mr. Holder: Nothing; yes, sir.

Mr. Hunter: I think on page 12 it says: "We also wish to add that the bill as it is currently formulated may well cause a disservice for the very reason."

Mr. Mackenzie: I heard what he said at the end.

Mr. Holder: We believe that with all the presentations that are before you there is a need and that access is the key to settling the disputes. When the committee gets done, we are hopeful you will be able to influence the writers to change the act.

Mr. Hunter: We do not want to be dedicated by law to have to extend our appearances before tribunals, boards and so on just to continue the delaying parade we have right now. I gather you have seen today some persons sitting in this chair prior to us, very able people who represent management, who over the past 20 years, in some cases, have made an exclusive career of presenting management's perspectives before the labour relations board.

Our concern is that we are setting up one more long and expensive delay if the act is not clearly written. If nothing else, we are asking you to make sure the language is as clear as possible--certainly automatic access makes it as clear as can be--so we do not end up in lengthy litigation and lengthy debates before the labour relations board to make the case we have to make.

Mr. Callahan: Going to the question of automatic access, obviously we have heard from a number of union representatives, who have always referred to the preamble of the Labour Relations Act, as has Mr. Mackenzie, which talks about the question of collective bargaining between employers and trade unions. If you give automatic access, is that tenet of the Labour Relations Act going to be met or is it simply going to be compulsory arbitration, as it were, because each party does not want to bargain; they just let it go down the line to arbitration, and there they are?

Mr. Holder: I do not believe either party gains by not wanting to bargain. We want to bargain, and we want to create our own collective agreement. I believe management wants to do that. We are not in any way giving up collective bargaining. The Labour Relations Act is still there. We have to follow a procedure after we are certified, we have to meet and we have to bargain.

However, there are cases--and that is what we are talking about--where bargaining will not settle the dispute and where we are faced with decertifications and long legal battles. The evidence of bad-faith bargaining is before you. By inserting it into this piece of legislation, you are just extending the battles to another field. That is not going to serve the purpose.

We are here to serve a purpose in those cases where we cannot get agreement. There are people who argue that everything will automatically go to binding arbitration. That is not true. That is not even happening now when we have automatic access to quick arbitrations. Everything does not go there. In Manitoba, everything is not going there. There is evidence that this is not true.

Mr. Callahan: Let us say that historically, through the process of learning how particular arbitrators think--it is like judge-picking--you find how the arbitrators will or will not award and the strengths and weaknesses of

the arbitrators through the process. Let us say as a result of that, employers and trade unions decide that maybe it is better to go to arbitration and get this clause, that clause or whatever.

Mr. Holder: In our presentation, we are saying we will go to the board. Your picking of judges, maybe it is a little clearer in the case of judges; they sometimes get mixed up in the political field. Arbitrators try to stay in the middle of the road. They know that if they do not keep one side or the other happy, if you are talking about the arbitration field that is out there now, they are not going to get any business from that; so they stay in the middle of the road.

Mr. Hunter: What you are saying basically is that as a track record develops, some arbitrators may be more prone to have developed a penchant for a good seniority clause versus wages, and depending on what you are looking for and what is in contention, one party will be looking at this arbitrator because he has shown that kind of leniency while the other party will oppose. However, it takes both parties to agree on who the arbitrator is going to be in the final analysis. Whoever is chosen, obviously they are prepared to live with their decisions--

Mr. Callahan: Not under this bill. Under this bill, you each select an arbitrator. Then, as I understand it, the two arbitrators select a third party as chairman.

Mr. Hunter: That is the same as in grievance arbitration where there is a nominee procedure. The act does not provide for that; most collective agreements do. The nominee does not operate totally independently from the union or from the company to which he has been appointed to serve.

Mr. Callahan: Let us say you have automatic access. Through this process the arbitrators, despite what you have said about them trying to stay evenhanded so they get hired, if they start making significant awards, why should anybody bargain? Why not go to arbitration?

The thing I cannot understand is that, when I was on municipal council and we were debating the question of whether we should settle or go to arbitration, the caution was always: "Do not go to arbitration. If you go to arbitration, they will kill you. The awards will be much higher than if you agree to it." As a result, the municipality just folded and accepted the terms. Are there different arbitrators, or what?

Mr. Holder: In my opinion, the key matter this committee has to deal with is the fact that we are not dealing with outright collective bargaining. When we are talking about cases that are going to arbitration, we are dealing with an organization that does not want a union. That is on the first agreement only. On the second agreement, you either get it or you are not going to be there.

Mr. Callahan: Precisely.

3:40 p.m.

Mr. Holder: That is why unions are saying, "We are prepared to go to arbitration on this." We are not dealing with the normal circumstances of whether we get a contract. We are dealing with whether we have a union in that place, whether we are going to be unionized or not. That is the issue that causes the fight. The Radio Shack issue was not necessarily over what was

going to be in the labour agreement; it was, "You are not going to be inside."

Mr. Callahan: That is the gist we get from many of the ones we have heard, that a first contract could not be had.

Mr. Holder: Then you cannot compare it to municipal arbitration versus collective bargaining or to my second labour agreement. I do not want binding arbitration on the second labour agreement. Once we get over the hurdle of whether there is a union or no union, we can bargain. We do not need the assistance of the government except through conciliation and mediation, and that is where all the agreements come down. A large majority are settled without disputes, but we are not able to get over that hurdle.

Mr. Callahan: All I am saying is that if you have immediate access and the things I have just suggested happen--we are attempting to direct the legislation precisely to the employers you are talking about, the ones who have said, "I do not want a union, and the way I am going to avoid it is by not getting quite to bad faith, but getting just about there, motioning it to death in front of the board and everything else and trying to run the gamut." Those are the ones who, by the very nature of it, need to be addressed on that issue. By open access, as has been suggested by a number of groups, you could very easily scupper the entire premise of the opening recitals of the Labour Relations Act.

Mr. Holder: I am sure the people who deal as arbitrators will deal in the field the contract is in. If I organize an envelope factory in Toronto, there are many that are already organized, and the arbitrator is going to be looking to that industry in handling and resolving that problem. He is going to know what the area range is in wages and benefits. That does not mean he is automatically going to go to those ranges, but he is going to know the field he is in.

I do not expect to organize a corrugated box plant in Metropolitan Toronto and have the arbitrator give the rate of the Abitibi-Price newsprint paper machine plant in Iroquois Falls, which pays \$24 an hour, to a small box plant in Toronto. I do not believe any arbitrator in his right mind would do that. There are very few fields that do not already have organized units. The arbitrator is going to maintain his scope in that field, and then the company and the union are going to have an extremely difficult time saying his settlement is not just, if it is in the field where they are competing.

Keep in mind that management has always argued very faithfully to any union--never mind arbitration or anything else--that it has to be competitive and has to stay in the market it is in. I find it hard to believe that an arbitrator is going to look to some other field for a settlement. If I organize an envelope factory, the arbitrator is going to look at envelope factories. If I organize a box factory, he is going to look at box factories. I just organized Revlon; he is going to look at Max Factor.

Mr. Callahan: Then there must be an entirely different situation that exists in private enterprise as compared to the public sector.

Mr. Holder: I think there is.

Mr. Callahan: In municipalities I have heard, and I am sure anyone who has sat on municipal council has heard, them arguing when a small municipality wants parity with Toronto or some other big municipality. I have never seen it happen because I do not think my municipality ever went to arbitration, but they would say, "If we go to arbitration that is exactly what we will get."

Mr. Hunter: That is a healthy fear. While you are fearing that in your secret meetings, your in camera meetings, the union is doing the same thing at the other end. Nobody wants to go in unless he absolutely has to and it is healthy not to want to go there. If I can just turn that one around, you say, "What if a trend develops where arbitrators seem somewhat generous in their awards?"

Mr. Callahan: Do not get excited.

Mr. Hunter: That is fine.

Mr. Holder: He just talks with a lot of action.

Mr. Hunter: What if that trend should develop in an unlikely way? We could go right around and ask, "What if a trend develops the other way?"

Mr. Callahan: I agree. If the trend develops the other way, the employers will want to go to automatic arbitration.

Mr. Hunter: That is right because they have access to the procedure as well as we have.

Mr. Callahan: Precisely. However, My hypothesis still stands that eventually you get to the point where everybody goes to arbitration, nobody bargains collectively and you have defeated the whole premise of the Labour Relations Act.

Mr. Hunter: I do not think history speaks to that.

Mr. Mackenzie: Surely that is a wild and off-the-wall proposition.

Mr. Callahan: Maybe.

Mr. Holder: You are saying that if we have automatic access, it is giving all to the union.

Mr. Callahan: No, I am not at all.

Mr. Holder: You are implying it could be through the arbitrators.

Mr. Callahan: It is giving it to whomever sees the arbitrators as coming down in a most favourable position. Both sides have automatic access to arbitration.

Mr. Holder: I do not believe that either side would argue in any way that the arbitrators are going to come down one way or the other. What we have to have is the key to how we get to the arbitrator.

Mr. Callahan: Mr. Mackenzie may be right. It may be highly speculative. We will not know for years to come, I guess.

Mr. Chairman: I think Ms. Smith wants to provide some balance to the debate now.

Ms. E. J. Smith: Keep in mind that what we are trying to find is something--using my negatives and positives correctly--that is less than bad faith which gives you access. We are trying to broaden the terms by which you may get access in first contract for the reasons given. We had representatives

of the Canadian Union of Public Employees, Ontario division, here today who suggested additions to clause 40a(2)(d). They thought the addition of the words "adopted by the respondent without fair and reasonable justification within the labour relations context" would improve it. That was their suggestion.

I put that out because you have made a rather strong statement here, and I am sure I am going to hear it repeated back to me in the House, that if this is all you can get, you would rather have nothing. I do not know if you sincerely meant that or if you have thought about it, but it is a pretty strong statement. I am asking if you have any positive suggestions for now it can be improved.

Mr. Holder: It is a strong statement and I am prepared to support it. I do not believe the government is not going to come forth with the bill. If you come forth with the bill and you are going to leave it that the only way we can get access to an arbitrator is by clear and decisive bad-faith bargaining charges, I would rather have no bill. I think that is what you are effectively doing.

Ms. E. J. Smith: We are trying to say that clause 40a(2)(b) is not bad faith.

Mr. Holder: You have not succeeded yet.

Ms. E. J. Smith: That is a different statement; that is why I am interested in clarifying it. Your position is that clause (b) as it stands only defines bad faith once again. However, the intention of clause (b) is to--I keep saying to broaden bad faith and getting corrected, because we are actually making it less than bad faith, if you want to get on it.

Mr. Holder: If the government spells out clearly and decisively that bad faith is not the only qualifier and lets us know what the qualifiers are--

Ms. E. J. Smith: If it is the intention of the government that clause (b) go beyond bad faith, the intention of clause (b) would be something you would be in favour of. You are simply saying you would rather not have the bill because it does not express properly the intention.

Mr. Holder: Right. If the bill says section 15 is the only way to get there--

Ms. E. J. Smith: The bill does not say that. Your interpretation of the bill is that it says that.

Mr. Holder: I realize that.

Ms. E. J. Smith: That is open to interpretation; put it that way.

Mr. Holder: Under the present interpretation, we believe it is only bad faith and we would rather not have the bill. If the government very clearly clarifies its bill with amendments that will not leave it up to debate of the previous presenter--because I have been debating with him for years--

Ms. E. J. Smith: This is a new bill.

Mr. Holder: Yes, but I am saying it will be open for debate the way it is at present and we believe there is no avenue to win except through bad

faith. All the rest is just intent, and intent is not good unless we clarify it in the law the same way that bad faith is clarified.

Ms. E. J. Smith: Those on the other side, management people, tend to point out continually to us that we will have to establish new jurisprudence for clause (b) and that in fact seems to recognize that clause (b) is something new.

3:50 p.m.

Mr. Holder: I find it very difficult to believe that we are going to draft a new bill that is going to give access to a new procedure that should not have some new jurisprudence.

Ms. E. J. Smith: It will have to, but that is only after the act.

Mr. Holder: There is nothing wrong with that. The previous man, arguing that it has to be only with what is established, is out of order. Anything new should have some new argument.

Interjection: Maybe we should have an interpretation of what it means.

Mr. Polsinelli: Mr. Holder, I would like to follow on Ms. Smith's comments a bit further. At present, if your union attempts to reach a first collective agreement and you are unsuccessful, effectively the only remedy you have is to strike.

Mr. Holder: That is right.

Mr. Polsinelli: If this legislation is introduced, no matter how little you may perceive it to give you, it gives you something more; it gives you an option other than the right to strike, which you may wish to pursue. You would have the option of either attempting to get access to arbitration or not pursuing that and being left with what you had initially. While I disagree with you, even if the test is established as being a bad-faith test, there would still be something that you did not have before. How can you justify not wanting it at all?

Mr. Holder: That is in your opinion; to me, it would be nothing. We have many cases in small units, and I would say 99 per cent of the small units are handled by labour lawyers, strictly because they did not have unions. They do not have a clue about the act or anything, so they go out and hire a lawyer. All of those lawyers know exactly where to stay on the line.

What you are telling me is that I am now going to take an act, and even if it only gives me bad faith, I am going to go to collective bargaining--the live one right now is W. H. Smith and I have a couple of others; we have a number of them that are running into a year--and I have my rights right now, if I have the muscle, if you want to use that word, to strike.

Keep in mind that when you organize small units, those people are not being organized to strike. Nine times out of 10, they are working for the minimum wage or just above, they have no seniority rights, etc., and they join a union to try to get some of that into a labour unit. The last thing in the world they want is to be on strike.

Mr. Polsinelli: I do not disagree with that, but the only thing I am saying is--

Mr. Holder: For Mr. Holder to take the strike becomes a very thin question of whether we can or cannot. If I cannot strike, I am faced with a decertification in a year, because there are many other intimidating things which can occur during that year.

Mr. Polsinelli: I am familiar with that.

Mr. Holder: What you are saying is that I should now agree to a piece of legislation that will give me one more step. Do you know what it gives me? It gives me one more step to a legal battle before the labour board, which will take an additional year.

Mr. Polsinelli: Not according to the time limits of this act.

Mr. Holder: I am going to have to battle. Where are the time limits to prove whether it is bad-faith bargaining? When I go to the labour board and file my--

Mr. Polsinelli: I understand what you are saying. Let me rephrase my question. What rights that you have at present would this legislation take away?

Mr. Holder: It does not take away, but what does it give me that I do not have at present?

Mr. Polsinelli: It gives you something, I think.

Mr. Holder: No. It gives public relations work to the public. It gives nothing to the small units that want a first labour agreement. It does not give me anything. If you are telling me that one more step to prove bad-faith bargaining, where history has proved it is the hardest thing in this province to win, is giving me something, then it is not worth it.

Mr. Polsinelli: No. We are becoming argumentative. I am saying there is a difference of opinion on that issue as to whether the test is bad faith. I clearly do not believe it is a test of bad faith. However, that being said, the only point I am making--and I think you agree with me--is that since it does not take away any rights from you, it either gives you something or it gives you nothing.

Mr. Holder: It gives us nothing.

Mr. Polsinelli: That is your opinion and that is the debatable point.

Mr. Holder: You asked for my opinion. It gives me nothing, so we do not need it.

Mr. Polsinelli: No. I am saying it either gives you something or it gives you nothing.

Mr. Mackenzie: I do not know why we are delaying our hearings at all. If the position is that hard and fast, we might as well have the Friday session and get this over with.

Mr. Callahan: I have a supplementary. It seems obvious that access is the major issue here. The government has presented a particular section. If an interpretation by a body higher than the Ontario Labour Relations Board said clause (b) was something less than bad faith, so that the labour relations board, being lower than the High Court of Justice or the Court of Appeal, would be required to recognize that fact and apply that principle, would you be satisfied with that?

Mr. Hunter: Why would you want that? Why would you be satisfied with that?

Mr. Callahan: Just a second. I am asking you the question. Suppose it were determined, not by Mr. Polsinelli, myself or various witnesses at this hearing, that it is not as much as bad faith. I think it is possible and I ask that legislative counsel check through the Courts of Justice Act to see whether there is provision for a reference to be made to the Court of Appeal of this province to determine whether subsection (b) gives something in between bad faith and automatic access.

Mr. Hunter: Why would you as law drafters, and you are law drafters in session here, be satisfied with something as ambiguous as that?

Mr. Callahan: Suppose a higher court that governed future decisions by the Ontario Labour Relations Board said clause (b) was something less than bad faith. We have heard from some of the witnesses, and some of them were lawyers. I cannot remember whether they acted for employers or employees. I suspect they acted for both sides. They have given differing opinions on whether clause (b) is something less than bad faith. If a court on a reference said that was the case, would you be satisfied with that? Would you be satisfied that you had something less than bad faith to argue at the board in getting access to arbitration?

Mr. Holder: For us to be satisfied with something less than bad faith, we believe there should be amendments to this act that clearly spell out a number of other steps.

Ms. E. J. Smith: Can you suggest them?

Mr. Callahan: Excuse me for a second.

Mr. Holder: What do you mean by the courts giving us a reference to clause (b)? Would they spell out what clause (b) means or just that it is something less than bad faith?

Mr. Callahan: They would interpret what clause (b) says, and as I understand it, that interpretation would be binding on a tribunal such as the Ontario Labour Relations Board. I do not know whether it can be done with this legislation, but it has been done with federal legislation that has directed a reference to the courts. The courts have interpreted the legislation so that everybody knows where it stands and you do not have to keep going to higher courts on individual cases.

Mr. Hunter: You are trying to do the same thing you are afraid we are going to do. You are passing on the responsibility.

Mr. Callahan: Not at all.

Ms. E. J. Smith: We are trying to define something.

Mr. Callahan: We are trying to define it and satisfy the proponents coming before this legislative committee that the legislation as drafted is something between bad faith and automatic access.

Mr. Holder: If you are trying to define something between bad faith and automatic access, are you telling me that with all the wisdom that exists in this building, we have to go to the courts to add clauses (b), (c), (d), (e) and (f), that this would be necessary to spell it out?

Mr. Callahan: The government's position is that clause (b) is something less than bad faith. It is obvious that because of the divergence of opinion we have received from various witnesses, the witnesses are not necessarily going to be satisfied by us humble individuals saying that.

Mr. Taylor: They do not have confidence in the infinite intelligence of big government.

Mr. Callahan: If there is a process through which it can be referred to the courts and they define it and confirm what we say--

Mr. Holder: If the government believes clause (b) is something less, then it should have no difficulty putting an amendment to the act that stipulates what clause (b) really means. Why write it so it is cloudy?

Mr. Callahan: In any event, perhaps I can ask for that information.

The Acting Chairman (Mr. D. R. Cooke): Ms. Smith had a supplementary. She asked whether you could suggest what it should read.

Mr. Holder: We did not come today prepared to submit an act. We believe that to do the job properly on first-contract legislation, it has to be separated by this committee. We are not dealing with collective bargaining as a whole; we are dealing with union-nonunion. That is the principle we really fight for on first contract. We believe in that case there should be automatic access. We did not come prepared to make amendments to that position.

4 p.m.

The Acting Chairman: Are there any other questions? Thank you very much. It was a very stimulating presentation.

Mr. Holder: Thank you very much for giving us the opportunity to appear.

The Acting Chairman: We now have the Board of Trade of Metropolitan Toronto.

Mr. McCracken: Mr. Chairman, the chairman for the presentation on behalf of the board is going to be a few minutes late. Is it possible to have a few minutes until he arrives?

The Acting Chairman: Sure. We will probably welcome it.

The committee recessed at 4:02 p.m.

4:17 p.m.

Mr. Chairman: Unless there are some objections from committee members, I think we should proceed.

Mr. D. R. Cooke: I do not think the Conservatives would ever be missed.

Mr. Chairman: Now, now. We have with us the Board of Trade of Metropolitan Toronto. I welcome them to the committee. We appreciate that they have come and have prepared a submission, which we all have. Will you introduce your delegation?

THE BOARD OF TRADE OF METROPOLITAN TORONTO

Mr. Dunsmore: Thank you. My name is Dunsmore and I am a vice-chairman of the labour relations committee of the Board of Trade of Metropolitan Toronto. I have with me my colleagues, Bob Goudie and Grant Clark, who are also members of this committee and have participated in the consideration of the bill and the submission we are making to you.

You may know from other submissions that the Board of Trade of Metropolitan Toronto has been a voice for the Metropolitan Toronto business community for a substantial period of time, well before any of us were alive; it was created in 1845. To my knowledge, it has always sought to contribute to your considerations on various legislative proposals.

At present, our membership exceeds 15,000 persons. You will appreciate that it represents a substantial cross-section of both large and small employers in the metropolitan area. We have many of the national employers who are of very large size, but we also have innumerable small employers who may well be more substantially affected by the import of this proposed legislation.

With that in mind, it is our intention to highlight certain of the provisions that we put to you in our submission. We invite your comment, criticism and inquiry as we go through it, if that is your pleasure, Mr. Chairman.

Mr. Chairman: It is customary to wait until you are finished. We find that expedites the process.

Mr. Dunsmore: If it assists any of you with respect to note-taking, I intend to begin at the beginning and make certain comments as I go through.

It goes without saying that, representing a business group as we do, it is important to assert that, in our view, the collective bargaining system currently operating within this province operates well. In addressing labour relations problems in the bargaining context, again we are of the view the Ontario Labour Relations Board already has a substantial capacity to deal with the problems before it.

That said, if the Legislature in its wisdom decides it ought to intervene in some way, it should do that with as little restriction as possible on the freedom to bargain and negotiate collective agreements. In the balancing of the interests of the parties, which I think everyone may agree has been a consideration in Ontario labour relations law for many years, it must ensure that the legislation is not utilized for the purpose of further organizing beyond what would be normal, nor should it enhance what I may call breakthrough bargaining, in other words, providing the opportunity for either

party to say: "We want terms that are substantially above what exists in our industry. If we do not get them from you at the bargaining table, we will go to arbitration and see how well we can do there."

In our submission, that type of imbalance, that abdication of the bargaining responsibility to people at the labour relations board or through private arbitration, would be inappropriate to encourage. We return to the observation that free collective bargaining, or bargaining, is better than imposition.

With respect to the fact that it is the intention of the government to move ahead with this legislation, we say you must not be misled, nor should the people who will be the beneficiaries of this legislation be misled, into thinking it is the be-all and end-all. It is to address only the introduction of the relationship between the parties; it is to create only the first agreement.

In our submission, again, the balance must be such that people do not misconceive their rights or privileges, only to be faced in a second agreement with the type of economic conflict which this government seeks to avoid the first time around. It is in that context particularly that we have provided you with quite a substantial appendix, which is an analysis of the success of first-agreement arbitration across Canada. It is from that appendix that we derive the figure that in only 43 per cent of the cases of first-agreement arbitration award has there been success in a continuing relationship. It is important, in our submission, to recognize that the type of intervention proposed here has not always been the most successful in producing a long-term relationship between the parties.

Ultimately, two prongs are to be considered. The first is how much knowledge and understanding of what is going on the employees involved actually have. Do they have the knowledge or not? To use the words of Professor Weiler, who is quoted on page 3, they have been flim-flammed into unionizing and they do not really understand the test to which they will be put. That is the economic test or, as Professor Weiler says, the "crucible of the durability of the union is the economic test."

That is the first problem. They must understand ultimately that they remain to be tested, and the real support of the employees must be demonstrated.

The second aspect of consideration is, surely again, the balance between the parties and the fact that the first agreement, if created, must be one that is reflective of what is going on in the appropriate industry. Is it reflective of what the parties would have achieved if they had otherwise bargained for the first collective agreement? It is perhaps those two reasons which may be said to have created the substantial failure rates that you find in the other provinces.

In attempting to be more specific about the proposals that have been made, there is a section on page 4 under the title, "The Applicant Must Have Clean Hands." We make this observation about subsection 40a(2): It appears to us that the test that will be before the board in the first instance, in substantial part, is what the respondent has done, and not what both parties have done. If that is to be the case, the way the legislation reads, it will simply be a horse race to see who can get his application in first.

Surely it must always be a balanced consideration and, therefore, it ought not to be a race between one or the other party; it ought to be a situation in which the conduct of both parties is considered.

This is important, because the way we understand the legislation is that it will be a privilege to receive the opportunity to go to arbitration. It will depend upon the discretion of the board in the circumstances. We say there ought to be a specific alteration in subsection 40a(2) to obviate the concern with respect to its being only the respondent whose conduct is tested in the legislation.

You will see in subsection 40a(2), clauses (b) and (c) particularly, the references to the uncompromising nature adopted by the failure of the respondent. Surely those matters ought to be considered with respect to the conduct of both parties.

One way to deal with that is simply to obligate the applicant, the one who is seeking the exercise of the privilege, to come there with, as lawyers would say, clean hands, to have conducted himself in good faith throughout the bargaining process. We have provided you with our proposals for amendments, which you will find at the top of page 5.

4:30 p.m.

Another concern we have about subsection 2 deals with the issue of reasonable justification, which is addressed in point 4 on page 5. We say that in addressing the balance of the parties reasonable justification as a standard is too broad. It should be more appropriately restricted according to the standards of the industry involved.

We say that for two reasons: (1) it will guide the Ontario Labour Relations Board in its determinations and (2) it will guide the parties in the way they bargain. We understand this legislation not so much legislation to be used but legislation that will encourage the parties to resolve their negotiations between themselves. If that is the case, then they must understand the standards they will face if confronted with arbitration.

Another consideration, which we will refer to again when we come to the criteria to be used by the arbitrator, is the spectre of what may be called social innovation. The idea of someone achieving breakthroughs, or taking new steps in a particular industry through a first agreement, is inconsistent with the concept of simply getting the agreement started, which we understand to be the essential purpose of the legislation. This is not a place where people ought to be achieving innovations in an industrial environment or labour relations context.

More particularly, if there are to be innovations, they should be things recognizing the concept of freedom of bargaining that the parties ought to freely agree to and not things that ought to be imposed upon them. This is not a circumstance where something or other may be said, for example, in the hospital field or the fire department field, but where arbitration is mandatory at all times.

For those reasons we think it would be appropriate to amend the observation in clause 40a(2)(b) with respect to reasonable justification to add the words "according to the standards of the industry involved."

In point 5 on page 6 we make an observation about final positions based on what some of our members have experienced. It is premised on the basis that

the essence of the legislation is to encourage the parties to resolve the matters themselves. With that in mind, it is important to obligate the parties to articulate their final positions. Invariably, you will find in the hospital field, or in other fields where arbitration is a regular practice, that offers are regularly put without prejudice. You may be faced with every issue that was on the table at the beginning of bargaining being on the table when you go to arbitration. That is inconsistent with the concept of narrowing issues, which is surely what bargaining is about in any context.

The idea of obligating the parties to stipulate their final position at the beginning of this process will be helpful because (1) it ties the position down, (2) it identifies it clearly so the parties know exactly where they are apart and (3) in accordance with your helpful proposition about the use of the mediator, it will assist the mediator to get on more quickly with attempting to resolve the matter.

In point 6, we say publishing the first decision of the board would be extremely helpful to the parties because it will more clearly identify where the deficiencies of either side are. More time ought to be given for the parties to consume the decision and make their own best efforts to resolve the matter. Our understanding of the legislation is that it is to encourage the resolving of matters between the parties. In that context, it is much like the Human Rights Code, which is not so much to prosecute people as to set the standards by which conduct ought to be carried out in Ontario.

We have also given you our position in point 7 on what we call accountability. Essentially we say you ought to turn around the proposal as to who will hear the cases if the parties cannot agree. Because of the legislative accountability that exists to some degree and the fact that the regulation of labour relations agreements in this province is done by the labour board, we say it ought to be that board to which we can come at least a second time. If other problems arise, the responsibility should fall to that board rather than to the independent arbitrator. Without further comment, we leave that consideration for you.

Item 8, the first paragraph: Clause 40a(4)(a) is simply a technical problem. In our view, the way the timing is articulated in the legislation is unfair. It gives one party four or five days more to prepare for the arbitration in quite a difficult process. There are two ways to deal with it: either make the time a little longer or alter the legislation as we have proposed.

We also observe that the time limit of 45 days perhaps is insufficient to permit the proper hearing and drafting of complicated collective agreements. We recognize that in certain circumstances it will be straightforward and most of the matters will have been agreed upon. However, there is no doubt there may be matters where everything is outstanding. Because this is a first agreement, nothing has ever been dealt with in writing before and there are no precedents in a particular industry. For example, in the trust company industry in Ontario, there is only one collective agreement. For many companies, there would be no collective agreements and no precedents at all with which to deal. Consequently, the very articulating of the documentation will be problematic and the issues will be more difficult to grapple with, because they have never been addressed before.

A most significant problem, in our view, is identified on page 8: "Return to Work." I know you have received representations with respect to this before. There are several concerns about this. The first one is that the

instruction of subsection 40a(11) of the legislation at present is that every employee who has been on strike or locked out has to be reinstated in his employment. We simply say to you, what happens if there is no employment to be reinstated to? If this arbitration process is the result of a substantial strike that is now to be resolved by arbitration and if that strike has been effective, there will not be jobs. In many industries with long-term contract propositions, the contracts will have gone elsewhere. There will not be work available.

Surely the intent of the legislation was never to oblige the employer to reinstate people to jobs that do not exist. That is not dealt with in the legislation, except to the degree that there is the observation that you do not have to reinstate people to jobs that have been permanently discontinued. What happens if they have been temporarily discontinued until the next onslaught of contracts comes in six months' time? What happens if the employer wants to get into the business again and does not say he has permanently discontinued that? Is he obliged to reinstate them, notwithstanding that he has no work? Surely that is not the concept of the legislation. The idea is to return people to work as best the employer can.

Then we get to the next concern with respect to reinstatement, and that is the proposition that this reinstatement is to be done on the basis of seniority. Seniority is a nice way to distinguish A from B, but it does not help the employer much if the most senior people are incapable of doing the work that must be done. You have not set a standard in this legislation that would test the people returning to work on the basis of their ability to perform the work that is available. That is not an unusual standard in any normal labour relations context, and it is one we urge you to reconsider. We have set out our concerns with respect to this at the bottom of the page. Indeed, we have provided you with some recommended amendments.

4:40 p.m.

Also, on page 9, we suggest clause 40a(11)(b) be amended by adding, after the requirement with respect to reinstatement by service, "provided the employee has the immediate ability to perform the work required." The reality is that the employer is not going to be able to get back to work if he cannot get people who can do the work immediately. That is why that is there.

Surely in terms of the balancing concept of labour relations in Ontario, the work is presumed to be done efficiently and at a profit. Employers in this province are not social agencies. They are not there simply to fund employees; they are there to make a profit. You are addressing this essentially to private industry. The people we represent want to urge upon you as much as possible that the concept of profit-making ought not to be interfered with by overzealous legislation or legislation that has not addressed some of the more specific problems.

Another serious consideration with respect to reinstatement is the idea of employees having impunity from misconduct. The legislation does not address the question of what happens to somebody who has beaten another employee in the course of the strike, destroyed company property or misconducted himself in some other way with respect to his employee responsibilities. We also have rulings from the Canada Labour Relations Board, most recently in the Pacific Western Airlines case, that say if an employer acts to fire or discipline an employee during a strike, it is an unfair labour practice and cannot be done.

This legislation, coupled with that type of ruling, says an employee can do anything he darned well pleases, subject to being charged criminally,

during a strike or lockout. Surely that is not the standard by which employee relations between parties ought to be tested. That is not the standard that is articulated in this legislation. The standard is that these relations between the parties will be tested by arbitration.

With that in mind, we have proposed that there be an amendment with respect to reinstatement. It is set out at the bottom of page 9 and the top of page 10 and stipulates that there be a provision for discipline for conduct during the period of strike or lockout. Notwithstanding that there is no agreement, it provides for the arbitration of those matters under section 45, which you all know is called the speedy arbitration process in Ontario whereby the ministry appoints an arbitrator to hear the matter within 14 days.

I urge those matters upon you. They are of substantial concern to the constituency we represent.

Item 10, with respect to the freeze, simply observes that it is inconsistent with the rights of the parties at present. The law now provides that employers or unions are entitled to alter the terms or conditions under which they operate once a legal strike or lockout occurs. The way we read this legislation is that although they have that right, if they do go ahead with a variety of alterations, they will have to flip-flop back once it is determined that this legislation should come into effect.

A similar concern relates to the question of retroactivity, which we deal with later in the brief. The proposition is that this bill be retroactive for a substantial period of time. The concern we identify is that for quite some time, a number of employers and unions have been able to alter some of the terms and conditions of employment. This bill would say notwithstanding all those legal rights, you must go back to whatever you had; it could be up to two years ago.

Surely that has never been the intention of the legislation, for one particular reason. This legislation will set a code of conduct for parties who are bargaining first agreements in the province. In our submission, it ought to set a clearer code of conduct than is currently provided in the bill. That deals with the question of the criteria for arbitration. If you are setting a code of conduct, it is based on the premise that if most of the parties understand that code from the outset, the likelihood is that they will be able to resolve their agreements because they will address the matters that would otherwise confront them at arbitration. With respect to the Ontario Labour Relations Board or the arbitrators, the thesis has always been that your own deal is much better than an arbitrated deal.

It is with that in mind that we have given you the propositions with respect to the criteria for arbitration. We say it is very important that the parties know in advance what considerations are liable to be made. We observe that, in particular, they will be economic considerations. We say they ought to be economic considerations with respect to the individual's competition.

On that point, as most of you know, when the labour board in Manitoba awarded the Eaton's contract some time ago under its legislation for awarding first-agreement arbitrations, it was made without concern for the competition. Eaton's announced it was going to be uncompetitive as a result of awarding the terms and would not be able to run a full retail store. It announced the layoff of approximately half of the bargaining unit. Subsequently, the union and the employer joined together and essentially eliminated all the noncompetitive terms the labour board had awarded originally.

I simply point that out as an example of why it is important for this body to communicate clearly useful criteria to the arbitrator or the board of arbitration. At the same time, those criteria will be extremely helpful to those who must bargain. No wise person is going to ignore the criteria he is liable to face at the labour board when he is doing his own bargaining. It is with those things in mind that we make our recommendations, beginning on page 11, that you first address the competitive situation in which the individual finds himself.

In dealing with that, it is not hard to observe that employers compete with both union and nonunion companies. Notwithstanding that, this legislation does not allow for any consideration of the nonunion companies. It simply says the board is to have concern for similar terms negotiated through collective bargaining for employees performing same or similar functions. Let me simply pose to you the trust company example again, where there is only one trust company in the entire province that is unionized.

Let us take a situation where there may be no or very little unionization in an industry, or a situation where it is asserted that, in considering the relations that ought to be stipulated in the financial industry, the proper consideration is that which is unionized, the credit unions in Ontario.

The first thing you must know about the credit unions is that many of them are directly related to unions, spawned by unions, and negotiate with a board of directors that is made up of union representatives. Without question, you will find that in nearly all credit union collective agreements, the terms are very substantial and indeed in line with whatever company is the one to which they are related. For example, the Stelco credit union has terms and conditions of employment that are similar to Stelco's terms. That is not to say those would be the appropriate terms for any of the other financial institutions in the province.

The proposition we put to you is that the obligation here ought to be to consider the terms and conditions of employment involved in the industry, because you have to address the people with whom the company competes and they are not totally unionized companies. With that in mind, we have provided on page 12 some proposals for amendments to deal with the relative industry, the cost of the proposals and the economic and competitive conditions within the relative industry and community.

Turning to duration, we observe that the proposal for a two-year agreement is inconsistent with all the legislation on this field in Canada. If the essence of the legislation is to begin the relationship between the parties, one needs only one season to see whether the ground is fertile and whether the relationship will grow. You do not need an agreement that is two years long.

4:50 p.m.

The other aspect of the retroactivity, in respect to term, is the proposition that some matters may be retroactive. Therefore, under the proposed legislation, it is likely you could have a three-year agreement because it will be retroactive a year and two years into the future. Surely that is not the intention.

Another concern with respect to retroactivity is it means you do not have to worry about the speed with which you bargain. You can dally in the

process. You do not have to have any impetus to deal because you are going to be covered anyway. Thus, we say retroactivity is a substantial concern. It is something you ought not give to the parties. It does not encourage collective bargaining. The term of two years, even from the date of award, is inappropriate. One year would be sufficient to satisfy the concerns.

I have spoken to retroactivity of the legislation, and we have noted on page 14 the minister's proposal with respect to allowing the board to determine which of a variety of applications it will deal with first if they come before it. One of those is decertification.

We simply make the observation that if first-agreement arbitration is to allow the parties to get off the ground and develop a solid relationship, and at the very time that is being considered there are sufficient employees to seek decertification of the union, then surely it would be inappropriate in that context to have a first agreement imposed before the decertification had been considered and resolved. It should be only in a situation where the union clearly has the capacity to represent the employees that it ought to be moving ahead with a first agreement.

Those are our submissions, and we are happy to respond to questions.

Mr. Chairman: Thank you, Mr. Dunsmore. It is a very thorough presentation.

Mr. Callahan: First, I would like to say it is a very well thought out brief. It stimulates a lot of thought in perhaps another direction from some of the stimulation we have had.

In looking at one of your proposals--and this is only a minor one--there was the question of notification to the respondent as well. That is probably a fair comment. The wording is 21 days for the giving of notice to the board.

Mr. Dunsmore: Yes.

Mr. Callahan: I agree with that. That is a fair statement.

Going over to subsection 40a(11) and your comments that it contravenes the rights under section 79, I could not find in section 79 of the Labour Relations Act the rights that you say are spelled out there. It says that with the consent of the trade union, they can alter the--

Mr. Dunsmore: Except if you go on further, the proposition that currently exists in the province is that once you move towards a strike date, as it is normally called, the terms and conditions that are normally in your agreement, or that were in your agreement if you do not have one, are frozen until such time as the minister has issued his no-board report, which is what normally happens, and 16 days run from the date of that report. Thereafter, the legislation says either party may alter the terms or conditions of employment.

Mr. Callahan: Where does it say that in section 79? It says the trade union is a part of the certification.

Mr. Dunsmore: You have to go to the beginning. It says: "Where notice has been given under section 14"--which is the one that would apply here because that is where you do not have the relationship previously--"and no collective agreement is in operation, no employer shall, except

with...alter...(a) until the minister has appointed...and..."--in the normal course--"(ii) 14 days have elapsed after the minister has released to the parties...."

Mr. Callahan: I see. You are saying that allows them to alter some of those terms. I would be inclined to agree with you.

Mr. Dunsmore: You will not find anywhere in this legislation, for example, a statement that says there exists in this province the right to strike; you will simply find this. The basic way in which the union alters the terms and conditions of employment is to withdraw itself from work.

Mr. Callahan: All right. You go on to deal with clause 40a(11)(b). You have suggested an amendment on page 8, that "the said clause does not apply so as to require reinstatement of every employee where the employer" and so on. I am sure you are aware that the bill itself contains a provision whereby application could be made under clause 40a(11)(b) to the board for--I am sorry; you probably do not have a copy of the bill in front of you.

Mr. Dunsmore: I know what you are referring to.

Mr. Callahan: It is similar to the rules of civil procedure. If you want to get something done, you have to get an order of the court.

Mr. Dunsmore: Perhaps I can suggest to you by analogy that surely it would be more appropriate to tell the parties what to do in the circumstance rather than have to go through the bureaucracy of seeking the representation. For example, you also deal with what the rights are in the interim. Our proposition to you is that this is a very basic thing. This is not something on which you need the exercise of the board's discretion; this is the way it is all the time, except for here. People do not come back on the basis of seniority only. In most cases, they come back on the basis of seniority, ability being considered and being satisfactory. You have changed that, and they do not even have an agreement here.

Mr. Callahan: Go to subsection 40a(12). On the question of "permanent discontinuance of all or part of the business," you talk about that not being broad enough to cover the situation where because of a strike business slacks off and you should not have to bring back all the employees. Does clause 11(b) not allow you to go to the board to get that right?

Mr. Dunsmore: The answer to that question is the same as put before. Yes, you can go to the board, but it is our submission that would not be the most efficient way to do it. Surely what you want to do in designing this legislation is to find the most efficacious way to resolve the matters between the parties and to get the people back to work.

Mr. Callahan: I can assure you, from other committees on which I have sat, the attempt of this government has been to try to avoid the necessity of going to a lawyer every time you blow your nose because of the costs and the involvement. I think the Change of Name Act is one where we simplified it to a large extent.

Mr. Taylor: What have you got against lawyers?

Mr. Callahan: We are trying to give the poor servants of the king the right to access without the necessity of the petition. As to clause (b), I think you will agree that in a situation such as this where there is the

question of maintaining mutual trust between both sides without one side thinking the other side is cheating, even if it is on an ex parte application perhaps with sufficient documentary material, it is a lot better to allow the board to be the buffer between the two to let everybody know that everything is aboveboard. As I read your entire brief--

Mr. Polsinelli: Those words are under section 12; you do not have to go to the board to exercise--

Mr. Callahan: No, but to do it, it does not have to be permanent or part of the business dissolving. You can go under clause 11(b) to not take back as many employees as you had before.

Mr. Dunsmore: I think the answer is that you can go to the board in any event. You do not need that reference there. If you put in the ability, in most cases that will be in accord with the normal practices of the parties. If the employer is acting in bad faith, access to the board is already available through a charge of bargaining in bad faith. This is clearly part of that.

Mr. Gillies: This is a very tricky area. I can see the sense in what you are saying. You have a company of 100 people, and after a lengthy dispute there are lost orders, etc., and you do not have enough work right away for 100 people--you hope you will eventually--so you want to have only 80 back. Your contention is that they not necessarily be called back on the basis of seniority.

While I have some sympathy with that view, there are a couple of things that have to be guarded against. For example, how do you safeguard against the employees who are not called back being the ones who organized the union in the first place? I am not saying it would be that common an occurrence, but how do you guard against what might be a certain vindictiveness directed at some employees after the end of a dispute, unless there is some meaningful protection in this section?

5 p.m.

Mr. Dunsmore: The first response would be that seniority with the ability standard is still a meaningful protection and not an unusual one within Ontario and within the labour relations community. We are not taking away the right to seniority.

The second one is the same response as before. If there is inappropriate action based on the fact that somebody has been involved in the union, there are all sorts of avenues now available under the legislation for that to be dealt with extremely briskly; you do not need to do it here. We already have a law that says if you do anything to anybody because of union activity, it is unlawful and it can be dealt with by the labour board.

The more important concern is the ability of the company to continue operating satisfactorily or, to put it another way, to start operating satisfactorily again.

Mr. Gillies: I do not want to take Mr. Callahan's time, but I want to ask the parliamentary assistant, using the same analogy, if there were 100 people working and a lengthy dispute and loss of business, whether it is the intention of the legislation to have the 100 people called back immediately. I cannot imagine it is.

Mr. Polsinelli: No. As I was saying to Mr. Callahan, subsection 12 of the legislation in the fourth line down, referring to subsection 11, states that "the said subsection does not apply so as to require reinstatement." Then it lists a number of areas where it does not require reinstatement. One of them is where there is a permanent discontinuance or where there is certain quality of work required that people with seniority would not be able to do. I ask you to reread subsection 12.

Mr. Dunsmore: With respect, if you review the Employment Standards Act, you will quickly come to understand why this legislation is drafted in the context of permanent discontinuance of work. That legislation envisages situations where people might be laid off literally for years, but those would not be considered permanent discontinuances of work. I refer you to regulation 286 of the Employment Standards Act and to section 40a, which deals with the severance pay propositions, because it is from then that the concepts of permanent discontinuance that are dealt with here flow and they do not allow for the protection we are concerned about.

Let me give you another example. What do you do if the six most skilled jobs that are absolutely necessary to be done are capable of being done only by people who are in the more junior categories, that is, more junior in terms of service? You literally cannot get your work done.

Mr. Polsinelli: In that situation I assume the workers would not have been doing that work prior to their going on strike. If you read on in subsection 12, you will see it says, "the employer no longer has persons engaged in performing work of the same or similar nature to work which the employee performed before the strike or lockout." In that situation, the six workers who were doing the work prior to the strike or lockout would be able to be recalled and it would not necessarily have to be on a seniority basis. That is my interpretation.

Mr. Dunsmore: With respect, I do not think that is right. What the legislation is dealing with there is where you permanently discontinued something to the degree that there is nobody doing it any more. I am proposing the situation--

Mr. Polsinelli: You have raised a point I will ask ministry staff to look over again; that is the purpose of these hearings. We are receptive to those opinions and we will take another look at that.

Mr. Clark: If you look at this issue of seniority in the way it is used in most collective agreements, you will find that it typically applies in cases of layoff and recall or in promotions. I am not saying the language is always framed in the same way, but you always have some reference that takes into consideration the person's ability and qualifications, or however it is drafted.

It is not done only on the basis of seniority; that does not work. That is where the seniority in collective agreements comes into play as being significant, but to try to apply that here and say it should be seniority without the consideration of disability would create situations impossible not only for the employer but also for the union to accept.

Mr. Chairman: Does the resumption of normal operations not ease your fears in that regard?

Mr. Clark: It is a question of what normal operations are at a given point in time. That is probably a matter of some interpretation too.

Mr. Gillies: This concern has come up a couple of times. It is very troubling.

Mr. Callahan: I want to go to one other item. You suggested on page 5 that the word "respondent" be replaced by "applicant" to avoid a race to the board on the question of arbitration. When I first saw that, it was somewhat attractive in avoiding the race to the board. However, if you look at it, it really would not make any sense because it would mean the party going to the board is complaining about the other party, falling within the framework of those subsections.

Mr. Dunsmore: What we have suggested here is that there be additional language. It may well be that I have misled you in my presentation. There should be another section exactly like the one dealing with the failure of the respondent--

Mr. Callahan: I see. I thought you were saying to replace "respondent" with "applicant" in that section.

Mr. Dunsmore: No. You are quite right to say that would be just as unsatisfactory. It should be both of them because we say there ought to be a balancing of the interests between the parties. Both should be tested in the same manner.

Mr. Callahan: My final question is this. You have seen the draft proposed by the government. You have also asked for a balancing. Do you see that as a balancing?

Mr. Dunsmore: That is why we began with the proposition that free collective bargaining is best. To put it frankly, we understand--

Mr. Callahan: We have had the other side of the coin too, that instant access should be added to it.

Mr. Dunsmore: We understand the government has made the decision that this ought to go forward. With that in mind, we are not coming here to say to you, "Do not go forward at all." As it was observed, we are trying to assist you as best we can. We say the legislation is not as well balanced as it ought to be. That is why we are making the propositions that we do.

Mr. Callahan: You also made a statement in the opening that free collective bargaining is not necessarily legislation. Travelling around the province, this committee has heard a whole host of horror stories in which that is not correct.

Mr. Clark: I can add something here. I have been involved in collective bargaining as a practitioner on the employer side for 20 years. I have negotiated probably in excess of 250 collective agreements. I think I have dealt with just about every major national and international trade union in Canada.

I work for the Hudson's Bay Co. In the past two years, I negotiated all the Simpsons contracts at a time when there was a lot of publicity going on about the Eaton's situation. We settled 26 collective agreements in Ontario and one collective agreement in Quebec. There are three different unions involved in that group. They were all first agreements and all were settled without a strike.

I am talking about the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America in Quebec, the Retail, Wholesale and Department Store Union and the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers in Ontario. If you were to talk to these unions, you would find we were considered as being tough but fair negotiators. We reached collective agreements in all those situations. That is what I found in my experience in the past.

Mr. Callahan: As the saying goes, "You act the nice employer, Mrs. Christie."

Mr. Clark: As a matter of fact, I worked for them once too.

Mr. Dunsmore: I would have said "responsible employers" in the context of the legislation.

Mr. Callahan: That is right.

Mr. Dunsmore: It is obviously a political judgement as to whether you go ahead with this type of legislation to resolve what you perceive to be a problem. We are simply saying that if you do go ahead, it would be extremely helpful to the responsible employers, and one would hope to everybody else, to be more aware of the standards by which they will be judged if they do not achieve a deal.

We also say one other thing; it relates to some of the concerns you may have heard. Sometimes deals are not struck in a first-agreement situation because the expectations of the parties are too high. In the way we read this legislation, there is nothing to set out what the standards ought to be. For example, the first time around, if you do not get a collective agreement--if you analogize it to a marriage wherein you begin with 20-year-old children, your mortgage paid off and a stock portfolio--you do not deal with it that way. You should not have the expectation that you will.

If you are a credit union in Sudbury or the nickel belt, you do not start out thinking you are going to begin with the agreements of Falconbridge or Inco. That is why we say you ought to set out the standards to assist us and they ought to be industry standards, both union and nonunion.

This returns to a complaint many people have. The Eaton's people complained about it and the Visa people complained about it. They want magic from the beginning, and the employers say it is not really the way they ought to deal with it. Surely the Stelco workers would say the same thing after all the strikes they have been through. You do not get everything for free the first time.

5:10 p.m.

Mr. Clark: Picking up on the point you were mentioning, one of the things a number of unions will say to employees, not only going into first collective agreement negotiations but also when they are actually organized--and I guess it is a fair statement on their part--is to promise certain things they are going to get in a collective agreement. They will base it on other collective agreements that exist perhaps in different industries. Quite often this will be the basis on which people sign membership cards for the union.

The responsible unions--and I found this even in the case last year in dealing with the Simpsons situations--when you really get down to bargaining,

have a much greater interest in establishing a bargaining relationship than in trying to break the bank. Sometimes what happens is that a union that has made promises--and maybe the leadership of the union is not that strong when it gets into bargaining or has problems with committees and employees to which it has made promises--runs into real difficulties when it is unable to deliver. I do not find that is terribly responsible bargaining.

In my experience--and I have dealt in the hospital sector too, where arbitration is already provided for--the best collective agreements are probably ones where both parties shake hands but go away from the table a little disappointed that they did not get what they wanted.

Mr. Taylor: We have heard that expression as well in the past. We have also heard voiced the concern that, with the way this legislation is worded at present, unions now will be able to deliver. If you are going to take a typical contract within an industry and say, "These are the criteria an arbitrator is to follow," that is a pretty good selling point.

Mr. Clark: You are darned right it is. It is a very good selling point, and that is one of the concerns we have.

Mr. Taylor: If that is a good selling point, would there not be some inducement to go quickly to arbitration rather than to go through the freely negotiated contract routine? In other words, would this, as opposed to a mandated contract by an arbitrator, impede the negotiated contract?

Mr. Clark: It depends on the access to arbitration. If the access is there--

Mr. Taylor: That is right. Now we come to that point. My next question then is, how do you structure that access in such a way that it does not provide disincentive to negotiation and at the same time provide access to arbitration where people start throwing up their hands?

Mr. Clark: If it is there as a safeguard and both parties are aware of it, certainly as a negotiator, if there was legislation that was sitting there that made me realize if I did not make my best efforts to reach a bargained agreement, it would put me in a position where I would run the risk of having something imposed on me that I would not like, I would be very well aware of that.

Mr. Taylor: I feel uncomfortable with the way the area of access is structured in the legislation. I am not quite sure how you would do it.

Mr. Clark: I think we dealt with that.

Mr. Taylor: I have played around even with the final-offer selection type of routine.

Mr. Dunsmore: It is Russian roulette. Baseball teams can tell you how well that system works.

Mr. Taylor: At least what it does do is force the parties to advance something seriously, I would think. There has to be some merit in that.

Mr. Dunsmore: With respect, if you accept the proposition of legislation in the first place, I think the minister has come up with a useful approach whereby he gives the intervening step to the board. We are saying

that in that area there ought to be some more characterization in the criteria. But if you set the criteria as being industry-related and if you say that both parties have to be judged on their conduct, then that responds to a number of the propositions you were concerned about.

For example, are both of them bargaining well, or did one just rush to arbitration? If you rush to arbitration, we hope the board is going to say: "Sorry. You do not get to exercise the privilege of going to arbitration because you have not made your best efforts to effect a collective agreement. Go away and do that."

Mr. Taylor: You have drafted amendments that would ensure that.

Mr. Dunsmore: I am not prepared to go so far as to say they would assure that, and I am sure Mr. Goudie is not prepared to say that either, but we think they would assist the parties. We have written them right in here too.

Mr. Taylor: I guess we will be moving some amendments.

Mr. Goudie: It is not something that companies take lightly. I would not want an arbitrator to put criteria on the company without any control on that. That is really what you have when you go to arbitration.

Mr. Dunsmore: Mr. Goudie works for a small employer, General Foods Inc.

Mr. Goudie: I have also dealt with a number of very small units, because we have handled negotiations in some of our subsidiaries which are very small units. The difficulty we are facing here is with the legislation trying to get at that employer who supposedly tries to get around bargaining in good faith. A lot of the points we have raised here deal with the difficulties we face. I guess I am more sensitive to trying to go back and make things retroactive or to put the pieces back together again after you are in a strike or lockout. I think that is totally inappropriate and almost unworkable.

Mr. Clark: I guess we look at expecting the unions to be responsible in bargaining too. I think of negotiations that we went through last year. I do not want to dwell on them too much, although they were fairly significant negotiations because they were the first ones in a particular industry and they were with a major employer. I am talking about the Retail, Wholesale and Department Store Union in this case. It represents a lot of people in the supermarket industry, for example. When the union came in with its proposals, in a lot of the proposals they had, the language was lifted right out of collective agreements from the supermarket industry, but a department store and a supermarket are about as far apart as you can possibly get on a scale.

Mr. Dunsmore: They are agreements created during many years of bargaining.

Mr. Clark: The proposals reflected this kind of language. I found that what we as a bargaining committee had to do, and one of my key responsibilities, was to educate the people with whom I was dealing: "Listen folks, this is not a supermarket and we cannot have these conditions here, because they are not appropriate." We finally got our points across. As I said, we came up with a collective agreement that both of us could live with. However, you run into that problem sometimes. I guess the problem is made greater when employees have been pre-sold that they are going to get these

kinds of conditions, and the conditions look very attractive. As Mr. Dunsmore said, they are from more mature agreements.

That creates a problem, and I am sure that in the minds of some of the people who have appeared before you who find that some of the employers they deal with are very intransigent, in their words, and difficult to negotiate with, I question whether in all cases they want to hear what the employer's position is or whether they really want to take the time to understand it. They want to get the best collective agreement possible.

Mr. Goudie: I had a situation identical to that with the same union. In fact, I am facing it now. We have a strike deadline next week. It is a first agreement.

Mr. Dunsmore: This also relates to the 45-day question. We say it ought to be 60, because if you get a new industry and you cannot make a deal with a union, you have to go in front of the arbitrator and educate that individual. Otherwise, you end up with an unworkable collective agreement.

Mr. Chairman: I think the committee is concerned about the time limits in the bill.

There are no further questions. Thank you, Mr. Clark, Mr. Goudie and Mr. Dunsmore, particularly for the precision with which you have addressed the sections of the bill. That will be helpful when we come to the clause-by-clause debate, which we will be doing in this committee when the Legislature resumes.

The committee adjourned at 5:21 p.m.

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STANDING COMMITTEE ON RESOURCES DEVELOPMENT

LABOUR RELATIONS AMENDMENT ACT

TUESDAY, APRIL 1, 1986

Morning Sitting



STANDING COMMITTEE ON RESOURCES DEVELOPMENT

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Gillies, P. A. (Brantford PC) for Mr. Gordon

Clerk: Decker, T.

Clerk pro tem: Arnott, D.

Witnesses:

From the Labour Council of Metropolitan Toronto:

Sutherland, R., Executive Assistant

Lyons, M., President

From the United Auto Workers Union of Canada:

White, R., President

Gill, S., International Representative, Research Department

Nickerson, R., Administrative Assistant

From the Ontario Public School Teachers' Federation:

Hill, M. C., President

Lennox, D., Deputy Secretary

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Tuesday, April 1, 1986

The committee met at 10:05 a.m. in room 228.

LABOUR RELATIONS AMENDMENT ACT
(continued)

Consideration of Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: As some of you will know, the Legislature has given us the job of holding public hearings on Bill 65, An Act to amend the Ontario Labour Relations Act, more commonly known as first-contract legislation. The bill has passed second reading in the Legislature and has been referred to us. We have held public hearings for a month or so. At the conclusion of the public hearings this week, we will then debate the bill clause by clause to determine whether any amendments shall be made. It will then be voted on in the Legislature in the new session later in April.

This morning we have Michael Lyons and Ross Sutherland from the Labour Council of Metropolitan Toronto. Will you take a seat at the table? We welcome you here and look forward to hearing your views.

Mr. Sutherland: Do we give these to the chairman?

Mr. Chairman: Yes. Do you have copies?

Mr. Sutherland: Maybe you will want a copy.

Mr. Chairman: It is a petition. It is not all one brief?

Mr. Sutherland: No. It is all one brief.

Mr. Chairman: Oh, they are petitions.

Mr. Lyons: We will explain.

Mr. Chairman: Good.

LABOUR COUNCIL OF METROPOLITAN TORONTO

Mr. Lyons: I understand the format is to keep this rather informal, and we will attempt to do that. As well, we will attempt to keep it brief. I have had to serve in your capacity from time to time where a number of groups have come before me and presented their views on a particular topic. After you have sat for several days or perhaps several months hearing brief after brief, I know it gets very repetitive.

I am not sure what we have to say today will vary greatly from what you have heard already from organizations, such as the United Steelworkers of America, and I gather the United Auto Workers are appearing next. They are major unions, dealing on a day-to-day basis with organizing and the difficulties of reaching a first agreement on behalf of their members.

You have heard also from the Ontario Federation of Labour, a province-wide, central labour body like ourselves, which would give an overview of how unions in general see this problem. We will attempt to be brief and try to emphasize some of the points we believe are important in this matter.

First, let me speak to the petitions on this subject. We have presented the chairman with close to 8,000 signatures from workers, primarily from the Metropolitan Toronto area. These people signed the petition knowing full well that organizing today probably is denying hundreds of thousands of workers their right to a union. This is their opinion.

Let me explain what I mean by denying their right to a union. This is a denial of what we see as a democratic right--and it is spoken of in that way in a number of legislative documents in Ontario, in Canada and throughout the world, including the United Nations--a worker's right to a union. In our opinion, denial of this democratic right is brought about by an extreme inequality of power in contemporary society. That inequality is particularly evident in the service and financial sectors of our economy. When we speak of inequality, we are talking here about inequality in the power that rests primarily in the hands of the employers in this case.

We do not have a situation that is similar to the one that unions faced in the 1930s, 1940s and 1950s when much of our organizing was taking place in the industrial sector. The circumstances we face today are much different. As I said, the power now rests much more in the hands of the employers. They can now make much more effective use of that power than they did then.

This inequality of power has created a situation where many workers, even though they have the right by law to join a union, do not have the bargaining power to win a contract to improve their position or even a contract that will provide them with the basic elements of most union agreements. Here we are talking about the absolute basics, things such as seniority, a grievance procedure or some form of job security. In many cases, they cannot even get those things.

People say, "Oh, yes, workers have a right to join a union." What they have is the right to sign a card and to be certified. They have no right that we can determine that says, "You will have a union that will sit down and conclude a collective agreement with an employer." As a result, many workers who join unions find after a short time they do not have a union at all. Right here in the Metropolitan Toronto area, a number of unions have found themselves in that position. In some cases, those unions are even involved with some of the major unions: the steelworkers, the auto workers, to name two. Organizations, such as Blue Cross of Ontario, were involved and of course there were more recent situations.

As we have indicated, the power of the corporations we are dealing with today is very strong. They are not adverse to using their power. I refer you to articles that appeared in Thursday's Globe and Mail and Toronto Star, which indicated the results of the Canada Labour Relations Board hearings with regard to the Canadian Imperial Bank of Commerce. The board indicated the bank knew full well what it was doing and explained how it exercised its immense economic power to try to keep the workers at the CIBC from having a union. We do not want more situations like that. With some modifications, we see this legislation as being able to achieve such a result.

The inequity we have today is integral to the structure of modern corporations. There are very large companies, often multinationals, with tremendous financial reserves. They carry on their business in a wide variety of separate locations with the number of employees and quantity of business at each location being quite small. We have large corporations with extremely small bargaining units. Many of their business transactions, such as advertising, selling and delivery services, are done over the phone so there is no personal contact. They use the mail. They do not produce products you can quickly run out of if there is a strike, so they are not shut down. Let me go back again to the 1930s and 1940s. If there was a strike at General Motors or Stelco, when the plant was shut down, the operation was shut down. That is not the case today in these instances.

Even if the union is able to negotiate more than one bargaining unit for these companies, very often there are very large geographic distances between them that make matters very difficult. In many cases, jobs are low skilled. The bottom line is that even if we get into a strike situation, the very large size of these corporations enables them to withstand a long strike. As a matter of fact, in many cases it does not hurt their business at all.

One of the figures we just developed recently came out of the Canadian Imperial Bank of Commerce strike. I recognize that is a federal jurisdiction, but I think the lesson is there. As you may know, our labour council ran a "guess the bank's" contest to try to show what the bank corporate profit was for a day during the last quarter and then draw some comparison to what it was offering its workers in salaries and other conditions. It turned out that the average daily bank profit was close to \$8 million a day at that point. That was its latest findings.

The bank involved, the CIBC, made more in a day in the last quarter than the Canadian labour movement spent in support of the strike of the workers. I know a big deal was made about how much was put into that strike, but you can see in comparison to the wealth of the CIBC--and let us not forget the political and economic clout--it paled by comparison. That was our big effort and one I am sure we would not be in a position to repeat over and over again. There is no comparison here between the economic and political power of organizations, such as banks or Eaton's, and the unions with which they are dealing.

We see this proposed first-contract legislation as very important and necessary. By the way, it is not the be-all and end-all. In the petition we handed in, you will see that one of the items we have called for, and which people want, is first-contract legislation. There are a number of other matters as well.

For example, one that has come out during strikes is the need for amendments to the Trespass to Property Act. When you talk about changing situations, we do not even have to go back that far. I can remember my first organizing campaign. There was a plant, it was there and it was real. It had a parking lot and people went in and out. The plant was on the street with a couple of access roads. Even in the service industry, I was involved in the first contract at the Catholic Children's Aid Society of Metropolitan Toronto. Again, this was a single building on the street. It was the headquarters with a parking lot. In this case, there were two other locations, but basically that was it.

Now we are faced with employers--and I can use Radio Shack as one example--who are located in tens, if not hundreds, of locations but on private property. I can recall chapter and verse all the difficulty we had during the Radio Shack strike when we wanted to picket. We were not interested in picketing an entire mall or all the employers in a mall. All we wanted to do was make a case to the public about the dispute between the steelworkers and Radio Shack. It was nothing more.

We have to stand out in the street and, in some cases, a quarter of a mile to half a mile away. There is a Radio Shack in the Toronto-Dominion Centre complex. If we want to exercise what I understand to be our legal right to convince people not to shop at Radio Shack, how do we go about that in that type of complex? That is just one. Amendments to the Trespass to Property Act is something else we need. I know there were some rulings around the Eaton's situation that created a better situation, but I still think we have some way to go on that as well.

10:20 a.m.

Again, I will be brief here and then maybe Mr. Sutherland may want to add a few things. Some of the specific changes we would like to see in the act are ones that you have had before you as well. They occur in subsection 40a(2). We, as others, primarily see subsection 40a(2) as a test of good-faith bargaining. We argue strenuously against that kind of a test.

We tend to concur with the amendment proposed by the United Steelworkers of America. A clearer understanding that there has been a failure to effect a collective agreement should be sufficient. It could be by evident bad-faith bargaining but not necessarily; it could be if the respondents fail to adopt fair and reasonable bargaining positions or if it appears to the board that the parties are unlikely to enter into a collective agreement within a reasonable period of time, or for any other reason.

Our examination of the situation from coast to coast indicates to us that it is very unlikely to resolve the matter. If you get into that bad-faith bargaining, you are into months and months of further discussion, talk, tribunals and so on. Meanwhile, we have workers and their families suffering economically while this matter is being heard. When there is bad-faith bargaining, we feel this section is important and ought to be amended.

The second area we are concerned about is subsection 40a(15). Looking at some of the strikes and situations we are faced with these days, we see that they are in sectors that have not been largely unionized yet. I have great hope that we will be able to make some progress in those areas, more if we are able to get this legislation through. If we are left with section 40a, there is no comparative area for arbitrators to look to, to include in a collective agreement, an arbitrated agreement. What we are often left with then is an employment standards type of situation. It seems to us that leads to nothing.

The employment standards were there before and could be used as another way of frustrating the union bargaining attempt. Currently, one of the efforts of the collective bargaining negotiations is to provide better economic conditions for the workers there; that is primarily why they joined the union. They joined for other reasons as well, but certainly for that.

We think those two areas need to have those changes made. I know it does not say bad-faith bargaining, but I think the words imply that, if they do not

say it directly. An amendment to subsection 40a(15) in a way that would give much broader abilities to the arbitrators in setting a collective agreement is also needed.

With those two changes and the introduction of this act, I think we will have gone some of the way, but not all of the way, to narrowing the gap between what we see as the major economic political power of the corporations today--especially those in the banking, financial and retail sectors--and the unions and the members themselves. Before we take questions, Ross wants to add a few points.

Mr. Sutherland: I do not have anything to add except to underscore the seriousness of that inequality in terms of organizing and ensuring that these workers have a right to a union. That right is effectively denied at the organizing level and also in cases where they do get a contract by the inability of that union to function, because the contracts do not have clout.

Strong first-contract legislation is a step in helping to readdress some of the problems created there, if you are concerned about a worker's right to a union, and I presume we all are. To have weak first-contract legislation is effectively to do nothing. That would be unfortunate on your part.

Mr. Chairman: Thank you, Mr. Lyons and Mr. Sutherland. Are there some questions from members of the committee?

Mr. Gillies: Thank you, gentlemen, for your presentation. Mr. Lyons, I have one question which arises out of the fact that you used the Canadian Imperial Bank of Commerce strike as an example in several areas. As you pointed out, that strike, being of the employees of a federally regulated agency, came under federal first-contract legislation. Can you tell us why the federal legislation was unable to come to grips with the type of problem you cited in terms of the length and bitterness of that strike? Why was it unable to do so and why would provincial legislation be able to do so in a similar strike covered by this legislation?

Mr. Lyons: It was not able to. As I said earlier, you have to show bad-faith bargaining at the bargaining table. That is a very difficult thing to do. I had the opportunity to read through the United Steelworkers of America presentation, I think it was. There were examples of what you can face at a bargaining table.

If you and I were in negotiations, and I was trying to buy something from you and you were trying to sell something to me, you and I could talk long and hard and never reach a settlement, if that were my wish. You could never say, "Lyons, you really do not want to reach an agreement." I could add a bit here, take a bit away there and make it look as if I am negotiating, but I am not negotiating at all. I am leaving you in a position that is absolutely untenable. I make a suggestion knowing beforehand that it is a suggestion you cannot accept.

If somebody says, "You are bad-faith bargaining," I can say: "I am not. I have made these proposals. I have made these shifts. I have made these amendments. I have tried all these moves, but I understand your situation." I never make the move that would open the door for you to conclude a collective agreement. If I do make a significant move and you accept it, it is one that leaves you in the position of being so weak as to lose in the long run.

That is my understanding of what took place in the case of the Canadian Imperial Bank of Commerce. The same kind of situation happened with Eaton's,

offering minimum packages that the employer knew would put the union leadership in a very bad situation vis-à-vis its membership, if the union were to accept. Obviously, they were very surprised when the final offer was accepted.

Mr. Gillies: While they are marching around, they watch Simpsons settle with a more generous package for its workers. It leaves the workers wondering, "What do I need the union for?"

Mr. Lyons: Exactly.

Mr. Sutherland: Perhaps I can comment on the federal one. I was fairly active in the strike, and while I am not an expert on the law, a large part of the problem is that there is no way to invoke the legislation. There is no way to get first-contract hearings going. There is no automatic provision. There is no way one side can demand it and get a response. Essentially, what happened was the political pressure became so great on the government that the federal Minister of Labour was forced to act. He asked for the legislation and got it.

You can see that partially if you compare it to the case of Graham Cable, another federal company that is on strike in Toronto. They have been on strike for close to nine months. They have been lobbying the federal minister for months--I do not know how many months--to try to get a first-contract hearing; they have had no luck doing that. They are engaged in a very long and bitter strike. I do not know what is going to happen there.

Mr. Gillies: Your feeling is that Mr. McKnight moved as a result of political pressure as opposed to the threshold in that act being reached. Had he relied solely on the threshold, the strike might still be going on.

Mr. Sutherland: There is no threshold as such; it is his option to introduce it when he wishes, as I understand it. He can ask the Canada Labour Relations Board to review any strike at any time to consider imposing a first contract, but it is his option.

Mr. Gillies: Let me rephrase the question. If he had relied solely on what we would normally call a finding of bad-faith bargaining, you do not believe the dispute would have been solved when it was.

10:30 a.m.

Mr. Lyons: No. First, I do not believe it would have been solved when it was anyway. Second, it should have been solved a long time ago. It was clear before the strike began, if you look at the history at the Commerce, that even at the hearings on the first-contract legislation themselves, they were fighting down to the last breath, the last minute before they had to get the decision. They did not want a decision. They were prepared to drag that strike out as long as necessary, and that was clearly their intention. They had no intention of settling.

Mr. Gillies: If I may be a bit of a devil's advocate here, some of the groups that have been in opposition to this legislation maintain that first-contract legislation, especially with automatic access, would act as a disincentive to bargaining, the argument being: "We do not really have to bargain because 30 or 45 days from now this will kick in. The arbitrator will give us what we want, so let us just wait it out." What is your reaction to that?

Mr. Lyons: The best agreements I have ever signed have been agreements we signed directly with the employer. That is better than this. This is not the first resort; this is the last resort we want. I will negotiate one on one any time in an attempt to reach an agreement. Even if there has to be a strike and an agreement is reached after it, that is still better.

As I indicated in my opening remarks, the only reason we need this legislation is that the economic situation is so uneven today the employer can force a strike with no intention of reaching agreement. At the moment, this is the only method that we have--that we will have, I hope--at our disposal to say, "No, you must recognize the right of these people to have a union." Any employer who wants to reach a legitimate agreement either before or after a strike can do that with the union at any time, without having recourse to this.

Mr. Gillies: I have one more point. I assume what we had distributed was a page of the petition you tabled with the chairman today.

Mr. Sutherland: That is right.

Mr. Gillies: How many signatures did you have on that?

Mr. Sutherland: There are just under 8,000. I know the vast majority is from the Metro area. We ended up having a few from all over the province and a few from outside the province, interestingly enough.

Mr. Gillies: Did you collect them in work places from the members of your affiliates?

Mr. Lyons: They were asked to mail them back to our address. We had no collection system; so in fact there could--

Mr. Sutherland: There are probably more out there.

Mr. Lyons: They could be out there, but they have not come back.

There is another fact that affected how many we got back; some of these were still out at the time of the Canadian Imperial Bank of Commerce strike, and suddenly this came to an end and there may be some out there for whom the pressure of the moment may not be there to sign it.

Mr. Sutherland: I hate to say it as an organizer who has a professional stake in these kinds of things, but the petition was something that came out of the strike support work late in the strike. Essentially, we mailed it through our mailing network and asked people to respond. Then we got into the hearings and there was never much follow-up.

I am still getting these things back in the mail daily. The response that is there is virtually unsolicited in the sense that we did not go out into the plants in an active, aggressive way. I did not phone one person to follow up on that petition. They just kept coming in. We literally got some in last week. I think there is quite a sentiment out there.

Mr. Chairman: When you did these, what was the long-run intention?

Mr. Sutherland: We were looking at ways of making the point that hundreds of thousands of workers in Ontario and Canada were being effectively denied their right to a union.

We wanted to lobby both the provincial and federal governments to say, "You have to take some serious action on behalf of these virtually hundreds"--I do not know the figures--"maybe millions of workers who are being denied that right, even though we say they have it."

We were going to lobby the federal government to impose the first contract and we were going to lobby here to get stronger legislation on the lines that are there. One is for first contract, and the other one is the nonuse of strikebreakers--people who had not worked there before.

Mr. Lyons: While the first-contract legislation is one of the important matters in that petition, it is not the only matter. I suspect you gentlemen and ladies will be hearing from us on other matters as well. I mentioned amendments needed to the Trespass to Property Act, and I am sure you have heard about those before as well. We think that is a vital change, but there are many other things.

It is too bad our annual yearbook is not here today. We do a yearbook, and the issue this year is the right to a union. We asked members of a number of our affiliates to write little articles on what they saw as their right to unions. Obviously, there is more than just being able to pay a dollar or two and sign a card that says they have joined the union. There is no point to that unless the union could, after the fact, exist, function and have offices and an ongoing reality. What did it take to have those and what are the other factors?

The rights to unions from their perspective were varied and included such things as: "Why do we have to handle hot goods? Should there not be something in Ontario legislation that says we do not have to handle hot goods?" We are not proposing that here today but just giving you some idea of a point that was raised by this petition. Having said that, the clear emphasis around this issue was on first-contract legislation.

Mr. D. R. Cooke: Is it fair to presume that these petitions are almost all signed by people who are currently members of a collective bargaining agreement as opposed to the people about whom we are concerned now? That is, union people, not first-contract people.

Mr. Lyons: It is probably fair to say they are primarily from people in the union, but I do not think they are necessarily exclusively from people in the union. They could very well be from a number of people who find themselves in this situation and are looking to us to help them improve.

Ms. E. J. Smith: Who did you send them out to?

Mr. Lyons: The mailings went out to our regular mailing list, which includes not only our affiliated locals--it is a much more extensive list than that--but also nonaffiliated groups, such as teachers' organizations, community groups and community organizations. It went well beyond the 422 local unions affiliated with us. We represent 175,000 members, but this petition went to far more than just those organizations.

Petitions were also available in the office for people who came in. They were on desks and so on. That is where we suspect some from the outside areas came from. People who were in the Ontario Federation of Labour building would pick them up and take two, three or four back to their locations in Thunder Bay, Ottawa or wherever they were.

Mr. D. R. Cooke: Is it common to have this kind of response to mailings?

Mr. Lyons: No. This is a huge response in comparison to any other petition we have done.

Mr. D. R. Cooke: The best you have ever had?

Mr. Lyons: Close. The only other petition I can compare this with in Metropolitan Toronto is one we did around Toronto Transit Commission fare increases. We got 7,000 or 8,000 names on a petition not to increase TTC fares, and over about the same period of time. On the other hand, we went after that one a little harder. We ran them at subway stops, on the subways and so on. We aggressively sought those; so this is extremely high.

Mr. Mackenzie: There is one question I would like to ask you. I gather from your presentation that the Labour Council of Metropolitan Toronto is willing to take a look at amendments such as those suggested by the United Steelworkers of America. There may be some slight changes when the OFL is here on Thursday; I do not know. A number of the unions in recent days have indicated a little tougher position--I do not know whether it is fair to say it is a tougher position--that automatic access, with some kind of a time frame only, would be the preferable route. In fairness to the steelworkers, they indicated that as well, but they did not think they could get it.

Is there any debate or discussion within the labour council on the point of whether the access should be straight time-framed but automatic or whether there should be amendments to the requirements to achieve a first contract?

Mr. Lyons: We have not discussed that aspect within the offices of the council. We have kept our talks more general, primarily because as a central labour body we are not the ones doing the collective bargaining and the organizing. We are a support organization for those who do the front-line work, and it is primarily their responsibility to do that. As you have indicated, different unions may have different perspectives and we have to try to meet them all.

10:40 a.m.

Having said that, when you talk about automatic access--I am speaking strictly for myself now--I suspect there must come a time when it becomes evident that no collective agreement is going to be reached, and at that point, it seems to me, the right to access must exist. I am not prepared at this time to say whether it is 45 days or whether it is after six months, after nine months or after they have been at it for a year. Surely, if you have no collective agreement after some reasonable period of time, the right exists to say, "We have no other option now but to apply for a first contract."

Mr. Mackenzie: In effect, you are leaving that argument up to the affiliates themselves.

Mr. Lyons: I am not necessarily saying it should change from one to the other. I think the affiliates themselves would have a better sense of how much time they need, because I believe the affiliates would much rather sign collective agreements in the normal manner than resort to this legislation.

A larger affiliate may say, "I can live with that after X days." A smaller one might say, "I need it a little faster," and we will have to come

to some agreement on it. However, it cannot be allowed to go on for ever, nor would we want it to be imposed too early, because that comes back to the point you were making: You do not need to get into collective bargaining if you know you are going to have it imposed in three weeks.

Mr. Taylor: I have a couple of points. It is possible you have the answer to this; I certainly do not. With respect to the access provisions of the federal legislation, it might be helpful to those of us who are not familiar with them to know what they provide. I would like that clarified.

Second, I am trying to get some concept of opposing strengths. You mentioned the disadvantage that the unions are at in securing a collective agreement. I do not think there is any question about the right to a union. I think you are talking about the right to a collective agreement. In Windsor, we heard that the imbalance is often in favour of the unions rather than the employer in that there are so many small employers who are often at a disadvantage for various reasons. That leads me to try to place your organization in the planetary system of unions.

Can you help me with some of those?

Mr. Lyons: Sure. I think Mr. Sutherland wants to reply too.

We are talking about two different types of employers here. Take a look at the Canadian Imperial Bank of Commerce situation or at any of the bank situations. It is a perfect example of what we are facing, especially here in Metropolitan Toronto. There are more than 1,000 branches of the big five alone here in Metropolitan Toronto. It is federal legislation, but the situation is the same. I can do this because I was involved in it at one time.

I think they are trying to tell you that Bob White is next.

Mr. Taylor: Excuse me, Mr. Chairman. Somebody has stolen our flag.

Interjection: It was in the way.

Mr. Taylor: I am wondering who is next.

Mr. Gillies: Mr. Chairman, can we establish whether there is some kind of revolution under way?

Mr. Taylor: I am sorry to interrupt you, but apparently there is something going on here that was not a part of the planned process. They will take the Union Jack or the Ontario ensign next.

Mr. Callahan: If they start putting makeup on you, you will know you are in trouble.

Mr. Taylor: In more ways than one.

Mr. Chairman: Mr. Taylor, you can be assured there is no revolution under way. They are simply calling in the flags to improve the trimming around the borders. You can be assured that the Queen is secure.

Mr. Taylor: That is a relief.

Mr. Gillies: I was worried, Mr. Chairman. I know Marcos wants to move and I am a little nervous.

Mr. Lyons: I will give you an example dealing with the banks. I suggest the same thing would hold true for Eaton's, large retailers or a number of others in terms of that. There are 1,000 branches of the banks in Metropolitan Toronto. Good, top-notch, really superior organizing would allow us to organize one branch a week. That gives you some idea of how long it would take us to organize 1,000 branches in Metropolitan Toronto. We are talking about three years. Organizing a branch a week is unrealistic.

Mr. Gillies: Twenty.

Mr. Lyons: Sorry, 52 weeks in a year makes it 20 years. What are we really faced with? There is a branch of the Toronto-Dominion Bank on the corner of Wellesley Street and Yonge Street. We go in and talk to the employees. It is more likely the case that they come to us. They say, "We want to join a union." They sign the cards. We sit down and negotiate with the manager of the branch in that case. He says: "I do not have to talk to you people. If you want to strike, then strike." This would not be his or her own decision; it would be from the corporate leadership.

We let them strike and they shut down that branch. However, the next branch of the Toronto-Dominion is only two blocks away. With today's technology, all the accounts are transferred. A little sign goes on the door saying: "Sorry for the inconvenience. You will find your money two blocks away." Those employees can sit out there forever and a day, walking around that branch of Toronto-Dominion. You can go on and on.

The same situation would occur with Eaton's. How many are there in Metropolitan Toronto? Are there eight or nine?

Mr. Sutherland: There are seven stores.

Mr. Lyons: There are a number of Eaton's stores, especially in the new malls. We mentioned the Trespass to Property Act. You cannot get access to their customers or to other employees. For them to say the balance of power is with us, I think--

Mr. Taylor: Excuse me, you are talking now about financial institutions, which are federal. I grant you they are powerful. I will not get into a discussion of towers of gold, feet of clay and all that. I am interested in the little shops in Picton, Napanee and Little Town Ontario. You are talking about balance of power and where the organizational opportunities are. I see it in so many of these little areas such as service industries, little shops and so on. For example, we heard in Windsor that the balance was in the other direction, that is, the power was in favour of the union.

Mr. Mackenzie: In all fairness, we heard it both ways in Windsor. It came from the chamber of commerce.

Mr. Taylor: That is correct. That is why I am introducing this. It is from the Chamber of Commerce in Windsor. I point that out to you because there are two points of view on this or there are differences of opinion. It depends on whether you are talking about the giant financial institutions or the little organizations. I have invited you to give some indication of your own association and the weight that might be attached to it.

Mr. Lyons: I am glad you agree with us on the major corporations, the finance companies, the major retailers, and you see no problem there.

Mr. Taylor: In terms of strength and power, yes.

Mr. Lyons: We will deal with the other one, and Mr. Sutherland is chomping at the bit.

Mr. Sutherland: I am chomping. Before I came into this job, I was an organizer with the garment workers' union for four or five years. Before I go into that, I want to respond specifically to the small industries because that is basically what I dealt with for five years. If you look at the service sector, you can look at everything from parking lots which went on strike in Toronto to Burlington Northern Air Freight on strike in Malton right now and Radio Shack.

Increasingly, as much as we may dislike it, those sectors are becoming dominated by extremely large corporations. It is not just finance. Look at Mac's Milk and the Becker Milk Co. Ltd. There are a lot of small businesses left and we are increasingly losing that, but that is a whole different problem. Let us not overemphasize the extent of that problem.

10:50 a.m.

The second thing is in the garment industry. I have lots of complaints about the Labour Relations Act; I think most of them are justified. We organized factories. Most of them were small factories. In five years, we organized only three factories of more than 100 workers, and we organized dozens of factories.

When you enter negotiations with a small company such as that, and you are sitting across the table from someone, you both know the costs of pushing it too far and you both have an idea of what you are going to get. That was crucial to our bargaining relationship. In virtually every instance we got a contract. We ended up in a few strikes, and we ended up in one or two strikes over the five years that were disastrous for both parties. However, most of the situations were settled amicably. We knew that if we went on strike, we would lose jobs and they would lose a company. That is a crucial balance that has to exist. That is why we settled. That is my response.

Mr. Taylor: Nothing says you have to win a strike or a company has to win a lockout. When you get down to economic sanctions, you do not know where the chips are going to fall.

Mr. Sutherland: That is exactly right. You are both gambling. Literally, it is a gamble. You are judging the other person's power. You get on to a strike picket line, you are out there every week and you start to think: "They are saying they are going to close. Our workers are saying, 'We are losing a lot of money.'" You are playing a fine line. Both sides are hurting. That is essential. That is how you come to an agreement. Perhaps one side sits there and says: "What I am going to lose if you stay out there forever? Half a per cent of my gross income for the next year?" What are we going to say? They do not care. They will sit there.

Increasingly, that is becoming the economic reality. It is not just with the banks. I went through a few other examples a minute ago. Look at our economy. Unfortunately, we are starting to see it even in the garment industry. We are starting to see the increasing size of companies and the increasing smallness of the units that operate. Within 10 years we are going to lose a lot of our small businesses in the garment industry. It has nothing

to do with unions; it has to do with the way the economy is developing. We are going to have small sectors of big corporations and we are going to have exactly the same problems they have in the banking industry.

Mr. Taylor: What is your membership?

Mr. Lyons: How big is our membership?

Mr. Taylor: Yes.

Mr. Lyons: The last time I counted, the Labour Council of Metropolitan Toronto represents approximately 175,000 members from about 410 union locals. It changes from day to day. They are from 42 different union organizations. Depending what the numbers are day to day, we are either the fourth or fifth largest central labour body in the country.

Mr. Taylor: You are not small.

Mr. Lyons: No. We do not pretend to be.

Mr. Taylor: You do not look puny from here.

Mr. Chairman, can you help us with the other question I asked?

Mr. Chairman: When we get to the clause-by-clause debate, we will make sure that there is legislation from other jurisdictions for the committee, as well as a summary of the recommendations on the various sections of the bill. That is a good suggestion.

Mr. Callahan: I am going to address the question of access. Access that is automatic has been the suggestion by some of the witnesses who have come before us. It turns out that over the long run arbitration seems to be beneficial to one side or the other. I am sure you will agree that automatic access would persuade the party that sees it acting as a favourable vehicle to drag its feet and simply not bargain at all. Automatic access might have the net result that the preamble to the labour legislation would have no effect whatsoever because there would be no collective bargaining. You would simply sit around on your hands, waiting for the arbitrators to get in place and to create a contract. Do you agree with that?

Mr. Lyons: I have not been dealing with arbitrators on collective agreements for 10 years now. There might be some instances. I tend not to agree with that. Remembering arbitration as I do, when you say it appears to one side to be favourable to it, I am not sure how you judge that.

Mr. Taylor: It depends whether they win or lose.

Mr. Lyons: I can remember arbitrations where I went in and thought, "This is a rock-solid case," and I lost. There were others where, quite frankly, I would say: "It is a bit touchy here. I am not sure." It is where you had to take it because of an internal situation within the plant or within the office. It really did not take an arbitrator. This is not just a contract, but a right to arbitration perhaps, and you win one you expected to lose. I have no way of judging whether you are going to win or lose in arbitration.

As a matter of fact, from history generally it seems that overall neither side tends to win from arbitration. Is that not what we hear over and over again? They try to avoid arbitration because, too often, neither side is

happy with the arbitrators themselves. They may have some sense of the economic issues, but they do not have any sense of the other important things, such as classifications, job security, health and safety and a whole range of concerns that exist within the plant. Too often, people come away unhappily from arbitration results.

I have been involved with the federal public sector. I worked for them for five years with the Public Service Alliance of Canada where, at that time, most of the members were in arbitration. The reason they are now out of the arbitration route is simply that they got frustrated too often by the arbitrator, who did not seem to understand. The same is true of the Liberal government, which decided it is probably better not to go to arbitration but try to settle it itself.

My answer is that I am not sure either side would ever see arbitration as a way of getting within the agreement something that they could not get out of collective bargaining. If they make the decision to go through the arbitrator for a first agreement, it is because there is no other recourse left. It is either get this first agreement or have no agreement and have no union. That becomes the issue.

Mr. Callahan: The information that we seem to be receiving from almost all witnesses addressing the legislation is to the effect that what the employers are talking about is that they are the ones who, right from square one, do not want a union. They are going to use every method they can to avoid one.

We also have information from the Canadian Manufacturers' Association in British Columbia saying it had an arbitrated settlement where there were 12 agreements, I think, which were imposed by the labour relations board, and only three of them resulted in second or subsequent contracts. I would hope that you would agree that if they are arbitrated, the chances of a second agreement coming about is probably less likely than if they are negotiated.

Mr. Lyons: Yes, I would agree. If you have a negotiated settlement, a second settlement is more likely than if you arbitrate the first agreement. But a second agreement is more likely if you have an imposed first agreement than if you do not have any first agreement, in which case you do not have a second one.

Mr. Callahan: To go back again, if you grant automatic access to arbitration without any preconditions whatsoever, does that not give the employers, the ones I was just talking about who definitely do not want a union and do everything possible to avoid it, the opportunity to drag their feet and tell you: "Go away; the process will take place eventually and then we will find some other way of attacking it, either by a judicial review or whatever"?

Mr. Lyons: No, it is because of the difference in their political, financial and economic clout. If they can get you to go away, you are not coming back unless you have a first agreement. You are gone for ever and it will not be solved.

Mr. Gillies: You are saying you would rather bargain than wait. As you said earlier, in your experience the best agreements are those that are arrived at by the parties.

Mr. Lyons: Sure.

Mr. Sutherland: Let me point out two examples that contrast. If you look at the Eaton's settlement, at what happened during the Eaton's strike, you can see how over the period it dragged out it was clear from the beginning that Eaton's was not going to settle. If they had gone to first contract early on, they might have settled with some semblance of order among the workers, which would have given them a basis to operate as a union and therefore a better chance of getting a second contract.

Compare that to the Canadian Imperial Bank of Commerce strike where the union movement took an extremely extraordinary step to support the workers who were on strike. In essence, what they did was pay them their wages so that they could make the honest choice about whether they wanted to work or to stay on strike. In that situation they stayed out right to the end. They went back, and that unit is now strong and will have a much higher percentage chance of getting a second agreement than the Eaton's workers. You can solve that problem earlier on by allowing automatic access in a situation where there is no first settlement contract.

11 a.m.

Mr. Callahan: Surely in both of those instances and even in some of the more horrendous ones such as Radio Shack, the preconditions that are suggested in Bill 65 would have been met. One or more of them would have been met.

Mr. Sutherland: No, they were not. In the Eaton's situation they were not met.

Mr. Callahan: That was a situation of bad faith. I will go to my final question.

Do you view the four preconditions in the proposed bill as nothing more than bad faith, as some of our witnesses have, or do you view them as something a little less than bad faith?

Mr. Lyons: They do not say bad faith. That is what I understand. There are no words that express bad-faith bargaining. However, as I read the words, I think they come down to that, using other words.

Mr. Callahan: What about clause 40a(2)(b)?

Mr. Lyons: It can be any other reason the board considers relevant.

Mr. Callahan: The reason I ask is that we have also had witnesses come here and indicate that, in their opinion, clause 40a(2)(b) gives something more than the bad-faith test.

Mr. Lyons: It leaves it open. What does "without reasonable justification" mean? If the employer says, "I cannot afford it," that is the reason. The worker says, "Why can you not afford it?" The employer says, "I cannot, but I am not opening the books." Is that reasonable? I have the same difficulty with clause 40a(2)(b) as I have with clause 40a(2)(d), where it says "any other reason." If it is not spelled out in better terms, I am not sure what it means. If it were applied extremely broadly, I suppose it could meet our needs. It could as easily be applied very narrowly which, historically, boards have tended to do.

There have been examples of boards having given a broader interpretation than we might have expected, but for the most part in Canada, tribunals such as this, and judicial tribunals, tend to take a narrow approach more often than they take the broad approach. Given that, I would feel better about the words the steelworkers have proposed, let us say, than those here. I would have a better sense that we have access.

Mr. Callahan: Assuming that some tribunal or body was to say those preconditions as set out in Bill 65 were something less than bad faith, would you be agreeable to those preconditions?

Mr. Lyons: I am sorry, would you repeat that?

Mr. Callahan: Let us say a definitive interpretation was given that clause 40a(2)(b) injects into the preconditions something less than the illusive bad faith which has existed in the past. Would you be satisfied with that?

Mr. Lyons: No, because it is a matter of degree. Is it a little less or much? I cannot get a handle on it. It should be much more specific. It is just a generality. These words could still leave us in a situation where you may not be able to prove bad faith, but workers on strike are trying to get access to this legislation and at the same time appearing before other tribunals, while the strike is on and the workers are faced with suffering economic hardship, to try to get an interpretation of this. That is justice delayed, justice denied.

Mr. Callahan: However, if there was a definitive interpretation that said clause 40a(2)(b) was less than bad faith, would you be satisfied with those preconditions?

Mr. Sutherland: This is a responsibility you have as a committee. What you are talking about is that, if a company does not implement a certain kind of grievance procedure, for instance, this is a step you could choose to take. I would not support it and I will tell you why.

However, if a company does not have seniority laid out in a certain way or does not deal with certain health and safety concerns or various categories, the only way you could get around the general statement would be to lay out the specific thing that has to go into a contract. You can appreciate the difficulties, because every negotiating situation is somewhat different and you cannot lay out specific language, since you want to be able to deal with the specifics of any situation.

If the intention is to allow access, to allow workers to have a first contract, you have to leave that option open. We just gave you examples. Unions do not like to go to arbitration. Employers do not like to go to arbitration. People use it as a last resort. Your statistics on British Columbia show it is a last resort. People are going to try to negotiate, but you have to leave that door open to save endless court hearings and very bad rulings and make your intention clear. That is what we are saying.

Mr. Callahan: We may have to go to arbitration over that because we are not achieving a collective agreement here.

Mr. Chairman: That is the last of the questions. Mr. Lyons and Mr. Sutherland, thank you for appearing before the committee. While the points you raised had been raised before, you do reinforce them. You are also the first

group that has brought a petition to us. We shall make sure that petition goes directly to the Minister of Labour (Mr. Wrye). Thank you very much for appearing before the committee.

The next brief is being distributed to the committee members. It is from the United Auto Workers, and we have Bob White and his delegation, Mr. Nickerson and Mr. Gill. Mr. Gill, the bearded fellow, used to haunt these halls in a previous incarnation. We welcome you to the committee, and look forward to hearing your views.

UNITED AUTO WORKERS UNION OF CANADA

Mr. White: If it is appropriate, I will walk through our presentation and supplement it in a couple of areas, and of course have some dialogue with the committee about our thoughts on this.

We welcome the opportunity to appear before the committee and present our views on Bill 65. Our union represents 126,000 workers in Ontario in a wide variety of industrial, office and service occupations. While the majority of our members work in the auto, aerospace and telecommunications industries, others work in such diverse areas as agricultural implements, airlines, food processing, mass transit, appliances and construction equipment. We are very familiar with the difficulties of organizing workers and effecting collective agreements, not only with large corporations, as is the usual public perception, but also with many small employers.

First-agreement bargaining often is an extremely difficult process for both workers and employers as they attempt to come to grips with a collective bargaining relationship. In some cases the two parties are able to establish an effective relationship without the need to resort to a strike or lockout. Unfortunately, in all too many cases that sort of relationship is thwarted by the inability of an employer to accept the reality of the union and its subsequent determination to get rid of the union.

Our own experience in the Blue Cross, Fleck Manufacturing and other situations has convinced us of the need for effective first-contract legislation which will avoid protracted first-contract strikes and allow the parties a measure of time to learn how to live with one another in a collective bargaining relationship.

The goal of employers such as Eaton's, Radio Shack, Blue Cross, Fotomat and the Canadian Imperial Bank of Commerce and many others has been to frustrate workers' rights to a union. They resist and refuse the workers' organizing efforts and, failing that, refuse to sit down and bargain a fair and reasonable first agreement. Faced with the reality of such employers, first-contract legislation is an absolute necessity.

I indicated at the time this bill was introduced that it was a positive, important first step. I also said then, and I must emphasize again today, that this bill contains a serious weakness.

Our position is that access to first-contract arbitration should be granted upon request, as it is under Manitoba legislation. The burden of proof that lies upon workers under this proposed legislation constitutes a significant impediment to its fair and full use. Under the terms of this bill, workers would have to prove that an employer was guilty of bargaining in bad faith before arbitration could be applied. I am sure you have been told of the horrendous length of time it takes to settle many bad-faith bargaining charges under section 15 of the act.

11:10 a.m.

Our experience shows that employers have devised many ingenious ways to appear as though they are bargaining, although in reality they are not. This legislation could encourage such surface bargaining, and I urge this committee to seriously consider amending it to allow access upon request.

In my opinion, the availability of access upon request will act as a stimulus to serious collective bargaining. The reason I say that is that in virtually every case, the agreement that can be negotiated between the union and the employer is vastly preferable to one that will be imposed by a third party. I want to come back to that because in a previous discussion, there was a lot of fantasy that first contracts somehow set patterns and that they are great, living documents when, if you check the record on first contracts that have been imposed by arbitration in other jurisdictions, many cases contain the bare bones of a collective agreement. In most cases, a negotiated agreement is much preferable to one that is imposed by a third party.

The knowledge that an outside body can and will fashion a collective agreement if the parties fail to do so themselves will have a positive impact on the way both sides will approach the bargaining table. After all, it is the union and the employer who will have to live with the agreement, and one that they can fashion themselves is obviously preferable. For that to happen, there has to be a clear and recognizable means of access to first-contract arbitration. The proposed bill does not do that.

In our view, the conditions which the bill contains and which must be fulfilled before access is gained will not avoid protracted first-contract strikes and will result in unconscionable and interminable delays as the courts attempt to sort out the meaning of the word "frustrated" in subsection 40a(2) as both union and company lawyers argue before the board whether specific actions by an employer or a union constitute a failure to make reasonable efforts and whether certain positions are of an uncompromising nature without reasonable justification.

If workers and unions who are in first-contract bargaining have to prove one of these conditions before being granted access, I guarantee you there will be delays of months in individual cases, which defeats the purpose of the bill. If you want to fashion a mechanism that encourages collective bargaining, avoids lengthy first-contract strikes and provides an atmosphere in which unions and employers can learn to live together, then this bill must be changed to provide for open access. If that is not available, employers will continue to use labour disputes as a weapon against workers as a means to avoid the possibility of getting a first agreement.

The recent experience of the Visa workers at the Canadian Imperial Bank of Commerce illustrates the tactics that are available to an employer who clearly does not want to deal with the union. Those workers were forced to be on strike for eight months in an attempt to obtain what most impartial observers would consider moderate and basic provisions in the collective agreement. The patently unfair and unreasonable positions maintained at the bargaining table by the bank for almost eight months were successfully countered only by the unprecedented level of support by the labour movement.

Rather than illustrating the usefulness of the Canada Labour Code provisions, the final result in this case highlights the inadequacy of legislation that does not provide open access to first-contract arbitration. It took 16 days of hearings to make the case before that labour relations board.

I would also like to comment on subsection 15 of the proposed bill, which deals with the content of a first agreement once access has been granted. I find it difficult to understand the intent of clause 40a(15)(a), which compels a labour board of a private board of arbitration to take into account "whether the parties have made reasonable efforts to reach a collective agreement." To me, this clause suggests that an element of retribution may be involved in fashioning an arbitrated settlement. That simply does not make any sense. At this stage of the process, the only criterion should be what is considered to be fair and reasonable by the board or a board of arbitration.

This takes us to clause 40a(15)(b), which compels consideration of existing contracts in the industry as a guide to the arbitrated settlement. Again, this does not make any sense. If the only existing agreements in the industry are demonstrably inferior, why should that be inflicted on the parties?

If the purpose of the legislation is to promote collective bargaining, surely it makes sense that the collective agreement with which the workers and the employer will have to live with for two years should be one that is considered fair and reasonable by an impartial third party and that will be making reference to general conditions in the industry, the size and composition of the unit and the ability of the employer.

In fashioning a settlement on this basis, the board will undoubtedly not be imposing a superior agreement, nor should it impose a clearly inferior one. Both the union and the employer will be putting forward their version of what the collective agreement should contain, and the board, in reviewing and assessing what should go into the agreement, will take those positions into account.

Although there are a number of other minor issues in the proposed bill that give us some concern, such as the power of the minister to extend time limits, we have tried to focus today on what we consider to be the most fundamental aspects of the bill that have to be addressed to have fair and effective first-contract arbitration. The questions of access and of contents of agreements must be dealt with by this committee so that from here on we can ensure that once workers have exercised their right to form a union, there is a process in place that encourages fair and reasonable collective bargaining.

As you can see, we have not attempted to dissect the bill clause by clause. We want to have a more general discussion about it. I described it initially as somebody saying: "You can have the top half of the house, which has four bedrooms, a kitchen unit and three bathrooms. The only thing you do not have is the keys to get into it." That is where I see the flaw in the bill. It is a good first step, but I think a lot of people are creating horror stories about what this bill will or will not do to the collective bargaining process. Most first contracts are settled without the necessity of going to arbitration and they would be, I would suggest, under this legislation, because we fundamentally believe in the free collective bargaining system.

The problem is when you get employers, and we are finding more of them these days, who will hire the best legal brains--I am not sure, but certainly they will hire legal brains--to try to thwart the process. When you read the Canadian Imperial Bank of Commerce decision by the Canada Labour Relations Board, it points out very clearly what an employer can do to try to thwart the collective bargaining process.

When people join a union, they do not join to become members of the union, first of all; they usually join because they want to do something fundamental about their working conditions, their wages, their benefits or their relationship with their employer. If you are not successful in doing that, for all intents and purposes the right to belong to a union in the province becomes academic.

One of the difficulties when you have to prove the criterion that is laid out in this act or in other acts is that you put much more antagonism into the system. When you go through 16 days of hearings at the labour board, as the bank workers did, with all the arguments that have to be put out there and all the witnesses who have to be called on both sides, what you are doing is putting more wedges between building a relationship in that situation. This is why we say access should be automatic.

I do not know a persuasive argument that says it should not be automatic. I have people say, "If you do not like it this way and it does not work out well, we can always change it." That is true; you could do that. But what about trying it the other way? What about allowing automatic access? If somebody says that there is no bargaining going on in the province any more on first collective agreements, that everything is going to arbitration, then you can take a look at it.

I do not think that is going to be the case. I think that in most instances the labour movement and most employers will realize their best avenue in this is to negotiate a settlement. This does not mean there will not be a first-contract strike or lockout. This means that when parties are around the bargaining table, it is obvious to either one of the parties--both the employer and the union--that this relationship is not going anywhere; that the employer, for whatever reason, is trying to thwart the right to have a union, but this union should not have to take those people on a protracted strike and go before the Ontario Labour Relations Board and try to prove bad-faith bargaining, which means usually calling certain employees to testify at the labour relations board to prove the case. All you are doing is delaying the process.

The other problem we have with the language in this act, quite frankly, is that with what is happening today in the courts with the Charter of Rights and a number of other things, we think there are going to be a number of appeals to that. This is why we strongly believe automatic access is the proper way to go. I quite frankly do not know a persuasive argument on the other side of the question.

As I said before, you can look around the country at most of the imposed first contracts, including the recent one at the Canadian Imperial Bank of Commerce, where people went on strike for eight months. If you look at that agreement, you will find that the economics of that agreement are a very minimal change from what they were prior to the strike. The Canada Labour Relations Board gave the workers some basic seniority and transfer protection, but it is not a model agreement; we would not use it as a model agreement in organizing any place. You could not say there has been any brand-new pattern. The best that has been accomplished there is that they have an agreement in place for a one-year period.

11:20 a.m.

This is a very important piece of legislation for Ontario, and the thing that makes it important is how we get to use it. It is not important on the

books if it reads well. It is thwarted in its use by having to prove things that complicate the collective bargaining system even more. If I can today, I want to try to impress upon this committee the importance of giving the parties access to the process.

There is a growing period in many situations, especially with smaller employers whose workers have joined a union. As soon as the organizing campaign starts, sometimes you can read if this employer is going to resist the campaign with all its energy. There are also employers who do not do that during organizing campaigns. There is a learning process, as there is with unions--learning to build a relationship. There are employers who deliberately try to thwart the cases; so there has to be some access so you do not have to go out and prove a lot through litigation to get access to the bill.

Those are my opening comments, and we are prepared to discuss our thoughts.

Mr. Chairman: Thank you, Mr. White. There are questions from several members of the committee.

Mr. Gillies: Thank you, Mr. White, for your presentation and for appearing this morning. I might say, almost parenthetically at the beginning, with regard to your comments about clause 40a(15)(a), I share that concern. We have had it brought to our attention by a number of labour and management groups whether this is appropriate or necessary instruction for the arbitrator. I want to assure you that almost certainly you will see an amendment forthcoming from us on that one.

Mr. Taylor: Whether you like it or not.

Mr. Gillies: I want to direct my questions towards your section 2. You said you felt the legislation was a good first step, although your preference is obviously for unfettered access to the arbitration process. I want to challenge that statement.

We have had at least one witness before the committee--in this case it was a union representative--say his feeling was that the legislation as worded here is so vague and would be so difficult to access that he would almost prefer to have nothing. The feeling on the part of several witnesses was that what this bill is going to be is a field day for the legal profession but of very little practical use to working people. Will you comment on that?

Mr. White: I do not share the view that nothing is better than this bill. This bill has a lot of problems with it and it opens up a field day for the legal professions on both sides of the bargaining process, but I would rather have a piece of legislation on the books that moves towards doing something on first contract than not have anything at all. That is how I feel about it.

Having said that, I feel very strongly that if we are going to do this, we ought to do it correctly if we can. I think we have an opportunity to do that. However, I do not share, and have not shared, the view of some people in the labour movement who have said, "If we cannot have it our way, we do not want anything at this point." I do not share that view.

Mr. Gillies: Have you had an opportunity to review the proposed amendment by the steelworkers when they came before the committee? The steelworkers' brief basically said: "We prefer unfettered access. We do not

think we are going to get it; so here is a suggested amendment we feel is vastly superior to the wording in the bill."

Mr. White: I have not looked at that extensively. I operate under the bargaining process. When I am coming in to talk about unfettered access, I would rather not suggest some compromise. It seems to me that is not a good way to start bargaining.

I have not looked at that. I have expressed to the minister, the deputy and others that I feel the right of access is so fundamental to the bill that I do not think those who oppose the right of access can make a persuasive argument as to how it hurts the process enough.

If the steelworkers made some middle suggestion, which obviously a number of people made as this bill was going into draft form, and if you could tell me what that suggestion was, I could tell you whether I think it makes sense. This morning, I would rather say we should move to the act, to unlimited access. I think that is the position we ought to be in.

I had made some suggestions earlier on about some ideas, but I do not see much of a compromise position between the access and what is written here. If the steelworkers have one and it gives some better access, I would be prepared to look at it.

Mr. Gillies: In the case of the Canadian Imperial Bank of Commerce dispute--as you mentioned, that went on for quite a long time, eight months--the benefits accruing to the workers at the end of that dispute could be described as minimal.

Mr. White: Yes.

Mr. Gillies: I quite agree with you. I am asking for your critique of the federal legislation. Why was it not more effective in dealing expeditiously and somewhat more generously with that dispute?

Mr. White: The first thing is we did not have access. That is the main thrust of it. We had to go through a long process from where we could point to the bank thwarting the collective bargaining process to where the Minister of Labour finally put in a mediator to the dispute. Then they became convinced there was no way they could settle the issue after eight months on strike.

Had we had access, my guess is after a month on strike we might have made an application to move to first-contract legislation because it was obvious to us that the bank was not interested in having a collective agreement. We tried a number of things, both behind the scenes and out in the open, to try to move the situation. The Canada Labour Relations Board decision, which I had a chance to read on the weekend, lays out very clearly the bank's actions, but there was still no access. We had to go before the board and prove conclusively the bank's failure to bargain. That is the problem with this.

Had we had access, we would not have had to go through an eight-month strike. You can ask yourself the questions: "Would those workers be better off today had they not had to go through an eight-month strike? Would their relationship with the bank be better today?" I think the answer to both those questions is yes. It hardened the issues on both sides and it is going to take a long time to build a relationship, if we ever do.

Mr. Gillies: The Labour Council of Metropolitan Toronto was here today before you came in. Their representatives felt the federal minister moved in that dispute more as a result of political pressure than because any threshold had been reached. The implication was that if there had been a prerequisite of finding bad-faith bargaining in that dispute, it would very possibly still be going on. Do you agree with that?

Mr. White: I cannot. All I know is that under the federal legislation all the minister can do is refer it to the board. He chose to refer it to the board eight months after the mediator went in and came back and said: "This thing is hopeless. We are not going any place." With the publicity and the effect of the strike, he chose to refer it to the board, which made the determination.

I do not think there was great political pressure brought to bear in Ottawa in the CIBC strike. It had been going on for a long time. Maybe the Minister of Labour said: "I do not think this makes sense politically or economically. Let us have the board take a look at it." There was no guarantee when he did that the board would impose a first agreement.

Mr. Gillies: What is your response to critics of this legislation who say the implementation of first-contract bargaining will practically eliminate effective negotiation on first contracts?

Mr. White: I think that is nonsense. We organize workers because we think we have the collective bargaining abilities to bargain collective agreements. We also think we are mature enough in most cases to build a decent labour relations climate with the employer we are bargaining with. We do not want that to be done by somebody else.

By the same token, if we run into employers, as we have in the past--and I am not talking about employers unable to pay or things like that--who are determined or, to be fair about it, who hire legal counsel who can make a lot of money out of protracted situations--they do not make much money out of short negotiations--which involve first-contract strikes, picket-line incidents and maybe decertification of the union, there should be some legislation that a union can turn to and say, "We want to use that." I do not think this will eliminate first-contract strikes all the time, but it certainly will not eliminate first-contract bargaining.

Ms. E. J. Smith: Thank you for your brief. I think you were here when the previous brief was presented, and you will have noted with interest the gentleman who made the statement that what negotiating is all about is that both sides are hurting and that this is essential to the process.

Mr. White: Both sides are hurting?

11:30 a.m.

Ms. E. J. Smith: The employer and the employee are hurting. You said in your answer just now you feel you are mature enough to work out something with the employer. I am suggesting that in first contracts, whether you call it experience or maturity, there may be some people who are just plain not ready to be reasonable. In fact, one or the other of the two is not hurting; in many cases, one tends to be more powerful. There is then the problem that going to arbitration does not resolve it and does not create the maturity, the experience or even the hurting that brings about a willingness to give and take.

Mr. White: I am not sure the relationship is any better after a six-month strike than it would be after an arbitrated award. At least an arbitrated award for a two-year agreement gives a chance to build a relationship with the employer without the necessity of a confrontation on the picket lines and all that goes with that. In most cases, I think you would have a better relationship with that employer.

That does not mean the employer may not still be determined to get rid of the union. They might still do that, but at least this gives the workers in the union a living chance to try to avoid that. I would make the argument that an arbitrated settlement that comes before or shortly after a strike or lockout will build equally as good a labour relations climate as one where somebody hurts after three months on strike for both sides.

Ms. E. J. Smith: I note you quote the two years. I gather you favour the two-year clause?

Mr. White: Yes, I do, rather than a one-year clause.

Ms. E. J. Smith: We have had people looking at clause 40a(15)(b) who have suggested that they should be looking not only at the same and similar functions of the employees, but also at the same and similar businesses and geographic areas; this, of course, is the idea that no one benefits by someone being given the kind of contract that would make him noncompetitive or bankrupt. This presents all of us with a dilemma. Maybe some lines of business should go bankrupt; it is hard to say. However, from the point of view of the employees or the employer, that can hardly be seen philosophically.

Mr. White: It seems to me that if we are going down this road, we must have some faith in the arbitration system and in the arbitrator or the arbitration board's ability to look at the economics of the situation and make a settlement. I do not think you have to draw a lot of guidelines because if you do, I think you are getting into much more complex arguments. The facts should be taken on the basis of the union's position and the employer's position, and the arbitration board or arbitrator should make the decision on that. I do not think you need a map that says you can only make it within certain guidelines. I do not think that is the way to go.

Ms. E. J. Smith: You think an arbitrator would do that without being told.

Mr. White: I think they would. You will get some cases in which they may not, but that is the process. We have always had that kind of process. This is not perfect legislation and you are not going to have a perfect arbitration system, but I think in most instances the arbitrator or the Ontario Labour Relations Board will take a look at the economics of a situation--it might look at comparative contracts--and make a determination. I do not think you should draw guidelines that say they have to do that.

Ms. E. J. Smith: My other question is because I do not happen to remember. What happened to Fotomat? Did it get caught in any economic binds or is it still around?

Mr. White: I cannot answer that question. I have read a lot of the evidence before the committee. Just because an employer is not around does not mean it was the union that put him out of business.

Ms. E. J. Smith: I recognize that.

Mr. White: I do not know about Fotomat today. I cannot answer that question. I honestly do not know.

Mr. Callahan: You made a comment that you would not come in here suggesting something that was higher up on the scale; I cannot remember your exact words. You did not consider it to be a good negotiating tactic to come in and ask for the bottom line, open access, rather than asking for or agreeing to something such as the United Steelworkers did. Do you not find that a bit of an unusual position to take when you are asking the legislators to take a chance on the open access and see how it works, and if it does not work, then retreat back to something less than open access?

Mr. White: I was asked the question, "What do you think of the Steelworkers' compromise?" I said that at this stage I feel strongly about open access. If I come in and suggest a compromise, it seems to me there is not much point in my arguing open access. Some people will argue today, "let us try the bill the way it is, and if you have to prove bad-faith bargaining, and if we end up in the courts with all the litigation, then we will come back and review the legislation and change it."

I am saying why do we not do the reverse? why do we not take the open access and put that in place? If it is obvious there is no collective bargaining going on in first agreements, that this is thwarting the collective bargaining system, then the Legislature has a chance to look at it. I do not think that will happen, by the way. I was trying to counter those who say, "let us take this legislation, and if it does not work, we will change it later." I would rather take the access. If it does not work well, let us review that later.

Mr. Callahan: I am sure that, although you are not in politics, you have had enough experience with political life through your organization to recognize that if you give a general right of open access, it is much more difficult to take that back and go to something less than it is to go to something, perhaps not less, but something restrictive and then to open access.

Mr. White: You are arguing from my side, but the employers would make the counter-argument. The employers could equally make your argument, "If you start with this and then move to open access...." They would make the same argument you are making today. I am saying that you have a half-decent piece of legislation attempting to deal with the case, but the piece that is missing is how you get access to it.

Mr. Taylor: which is the guts of it.

Mr. White: Which is the guts of it. If you cannot get access, the written words do not mean anything. The key argument in the province today is, should it be unlimited access or should we have to prove something before the Ontario Labour Relations Board? Employers will say if you have unlimited access, the unions are not going to bargain any more. They will use it in organizing campaigns. I do not think that is the case. In most cases, we will still bargain first collective agreements. By the same token, if that happens in a lot of cases, it will be obvious that there are still a number of employers out there trying to thwart the right of employees to have a union.

Mr. Callahan: As I said to the previous delegation--and it is probably a recognition by all members of this legislative committee of whatever political stripe--we have seen this particular situation arise where

employers did not want a union and did everything possible to avoid it. I think I can speak for my colleagues. We want to put at rest all the violence and unhappiness that occur as a result of that. Having said that and recognizing that the bad-faith test under section 15 has not worked with those employers, the rationale for the first-contract legislation becomes important. If the section as proposed, or as slightly amended, were to provide something less than the bad-faith test, would you be satisfied with that?

Mr. White: When you say "less than the bad-faith test," I do not know what that means. I do not know whether that gets us into trouble in the courts. I do not know how the courts will view that or how the labour board will view that. If you are going to take half a step, why do you not take the full step?

Mr. Callahan: If there was a definitive interpretation of that section by a court of a higher jurisdiction than the labour relations board that said that is not bad faith, that there is something less there than bad faith--

Mr. White: I do not think that solves the problem. You have to talk about access to a piece of legislation by union and employer in what becomes a very difficult situation if they want to use it.

Mr. Callahan: What you are suggesting is--I have tried all the alternatives on you--is that if open access does not work, we will go back to something that is more restrictive.

Mr. White: If people say it does not work. I think it will. If you look at some jurisdictions, such as Manitoba, that have had first-contract legislation, it has not wiped out the first-contract negotiations.

Mr. Callahan: Maybe not, but the real danger, if that does happen, if collective agreement becomes a dinosaur of the past and everything goes to arbitration, for whatever reason-- It may be unrealistic to say that from the field of the arbitrators available, employers or unions are going to decide it is better to go to arbitration and let the process flow because it is automatic. That is a hypothetical situation. You may say it is utter nonsense, and maybe it will be utter nonsense. In British Columbia, of 12 agreements imposed by the Labour Relations Board of British Columbia, three resulted in second or subsequent contracts. I think you would agree that if it is an arbitrated contract, the chances of a second agreement probably are weakened.

11:40 a.m.

Mr. White: I am not sure of that. It depends on the length of the agreement. It depends on the employer's attitude. You could equally, I am sure, in BC take another 12 certifications where there was no first contract applied for and where they have lost the certifications. They never established a bargaining relationship. That is no criterion.

The two years proposed in this bill give an opportunity to build a relationship. If a union has been in with an employer for two years, it has a chance to elect a local union committee and to build a relationship on the shop or office floor. At the end of that time, you ought to be able to sit down and, if it is a matter of economics, work out what you do. I do not think those situations would be around if you had not had first-contract legislation. Probably all of them would not have had an agreement.

Mr. Callahan: The letter we got from the Canadian Manufacturers' Association--

Mr. White: That is not a very good source.

Mr. Callahan: I am assuming it is accurate, recognizing perhaps that it comes from one side. They have given us facts at our request. They indicate that since 1974, when first-contract legislation was introduced, 34 applications for imposed settlement were referred to the British Columbia Labour Relations Board by the minister. They recount for us that agreements were imposed in 12, there were 14 settlements after referral to the board, six applications were rejected by the board and two cases withdrawn. Out of the 12 agreements imposed by the labour relations board, only three resulted in second or subsequent contracts. That is pretty clear and definitive testimony that if you have an arbitrated settlement, the chances of your second agreement are weakened to a considerable extent.

Mr. White: I do not think it is. I could say to the manufacturers' association: "What would be the numbers if you did not have first-contract legislation? Are you saying that those would have agreements today?" The answer is no. They would not have first agreements.

Mr. Callahan: Hardly likely.

Mr. White: This is not a panacea that will guarantee a long-lasting relationship with every employer, but it does give a living chance. That is the difference.

Mr. Callahan: But the legislation is meant to deal with those cases where the employer is doing everything possible to keep the union out. That is what the legislation is for. If that is the purpose we are trying to achieve through the legislation, then that perhaps is the difficulty in terms of automatic access versus some preconditioned access.

Mr. White: That is where the unions will zero in. They will not want to go this route for a normal employer relationship. There is no advantage for us to do that.

Mr. Gill: If I might comment on the statistics, one statistic missing is the number of first agreements arrived at without resort to the legislation. Whether there is a difference now, since that legislation has come into place--

Mr. Taylor: You would not know that without their covering that.

Mr. Gill: Except that we do not hear about the long, protracted first agreement strikes coming out of BC and Manitoba.

Mr. Taylor: It is simply a statistical recitation.

Mr. Gillies: Is there a better record overall of arriving at first contracts since the BC legislation came in? Are there statistics available on that?

Mr. White: I do not know the answer to that.

Mr. Callahan: Finally, if instead of automatic access, the legislation contains certain preconditions that have to be met--and that could be met; not the old bad-faith situation where the employer can run you around the merry-go-round--would that not be enough to impose upon these difficult employers the recognition that they have to bargain?

Mr. White: I do not think so. Some employers in this province will do whatever they can to avoid whatever legislation is written. The problem you are wrestling with today is the same problem that the drafters of the bill wrestled with, that is, what do you put down that is not in bad faith that makes some clear indication of the rules? I do not think you can find that. That is the difficulty.

Mr. Taylor: The statistical recitation, as I mentioned in connection with the manufacturers' association's letter, does not go to the value of the legislation in prompting negotiated settlements. That is probably a point you were getting at. I see the legislation as a second string to your bow, the first string being the right to strike, so there is that added incentive to negotiate a contract with the legislation in place.

I want to commend you for being straightforward enough to state unequivocally that the legislation in its present form is better than nothing. We have not had that stated so unequivocally before. What is troubling me is the statement you made in your brief addressing your concern about protracted strikes; you see this legislation as an answer to that.

Do you see the possibility of avoiding strikes with this legislation, or do you see the need to go through the strike process before you plug into this legislation in terms of a forced arbitration?

Mr. White: If you are talking about all first contacts, I do not see this legislation wiping it out in cases where people want to exercise their right to strike or their right to lock out.

Where this legislation comes into play is when it is clear to the parties early on--from what is going on in the certification procedure or at the bargaining table--that there is no way they are going to get a collective agreement without a long, protracted strike. If you go into that, then you have to prove some other things. That is when the union would say: "It makes sense to move this to a first-contract situation. Let somebody else settle it for us. We are not going anywhere."

I do not know whether the drafters of the legislation want to look at giving people either/or options; in other words, you have the option to strike or the option to use this. I have not given a lot of thought to that, but it is something that could be available. For example, I do not see a union saying, "We are going to take a good run at a strike for three or four months and then if we are losing the strike, we will automatically apply for first-contract legislation." That is surely not the way to go. There is no advantage in the union doing that because it is paying strike pay, putting people's jobs in jeopardy and a number of other things.

I do not think this will wipe out all first-contract strikes, because in most cases the union and the employer will want to use the collective bargaining process.

Mr. Taylor: I agree with that.

Mr. White: Where this will come into play is when you see an employer's actions and it is obvious you are not going anywhere; it is obvious you cannot build a relationship--the terminology they are putting across the bargaining table is designed to thwart getting a collective agreement. It used to be that those employers used union security. Then when the union security legislation came in, they started to use different methods. In those instances, I think the unions will move without a strike to first-contract legislation.

Mr. Taylor: Do you see the utility of defining the length of a strike that would automatically trigger arbitration?

Mr. White: Are you saying it would automatically trigger arbitration or people could have access to it?

Mr. Taylor: I am saying automatically trigger.

Mr. White: That is a little different. I think it is a question of access, and, of course, the employer has the right of access as well.

Mr. Taylor: It would be legislated access to avoid a protracted strike.

Mr. White: Yes, again, as a first contract. Personally, I do not have a problem if somebody wants to define a period of time after which the parties can have automatic access in strike situations.

Mr. Taylor: Either party?

Mr. White: Either party. I do not have any problem with that.

Mr. Gillies: During a strike?

Mr. White: During a strike, in the first-contract legislation. I personally have no problem with that.

Mr. Taylor: Any time?

Mr. White: That is right. You define a period of time during the strike in which they can have the access. What I am saying is it makes sense to have that access before you participate in a strike. You can take it another step and ask what the access would be if you had a strike for three or four weeks that is not going any place in the first contract. Can the parties then have automatic access? I do not have any problem with that philosophy or idea. I would like to look at what contrary people are talking about.

What we are trying to do here is to avoid those strikes that you know you are heading into in a first-contract situation and you cannot get around it. You just know you are going to be there.

11:50 a.m.

Mr. Taylor: You already answered my question when you indicated you were in favour of a two-year contract as opposed to a one-year contract.

Mr. White: Yes.

Mr. Taylor: Why do you see the need for a two-year contract if you have something imposed that neither party is too happy with?

Mr. White: The success of collective bargaining is in building a relationship between the employer, the union and the employees. If you go through this long process and end up with just a one-year agreement, you are almost automatically back in the process before the ink is dry. It does not really say much. Then the parties are again in a position of not building a relationship but trying to get that second agreement.

With a two-year agreement, it gives you more time to do that. It allows more time for the workers to be identified inside the plant. It gives us time to have a union committee and to build a relationship with first-line supervision, if you can do that. You are not right back in the bargaining process again. It gives those employers who are nervous about a union time to take a better look at things and say: "Maybe it is not all that bad. Maybe the legal advice I am getting is wrong. Maybe we ought to try to build a relationship."

I think one year is too short. I draw the analogy of the Canadian Imperial Bank of Commerce. It has a one-year agreement, and it will not be very long until those people are all bargaining again. I do not think the bank today has changed its mind one bit about its objectives.

Mr. Nickerson: That is similar to a parliamentarian wanting a four-year term.

Mr. Taylor: I cannot understand that.

Mr. Nickerson: Not today.

Mr. White: Whether you want one year or four years depends on which side of the House you are on.

Mr. Taylor: It all depends whose ox is being gored.

Mr. White: It depends on the Tories.

Mr. Chairman: It will depend on part 2 of the accord.

Mr. White: That is a good example. There is an accord. A one-year agreement was not satisfactory; people thought they had to have two years.

Mr. Chairman: That is right. This legislation is part of it.

Mr. Pierce: Mr. White, could you tell me how many certifications have been lost by the United Auto Workers in the past four or five years as a result of there being no first contracts?

Mr. White: I could not answer that. I would say probably six or seven.

Mr. Pierce: How many first contracts have been negotiated?

Mr. White: We probably organize an average of 40 units a year in Ontario.

Mr. Pierce: Could you give me an idea of what you see the bill doing after the arbitrator has come down with the first contract and it is not acceptable to either or both parties? What happens if it is not acceptable to the union or to the employer?

Mr. White: It is like every other arbitration case. You learn to live with it. It is like a divorce settlement. You have to buy it whether you like it or not. It is there for everybody to see. If you are going this route, that is the gamble you take. That is where the union comes into play. That is where the union committee sits around and says, "This is what we stand to gain or lose by this."

When you move into that process, you hand your destiny over to a third party. That is why anybody who thinks the labour movement will run out every time and use this to get a first contract does not really understand the scenario in the labour movement. As I say, if you look at first-contract settlements that have been handed down, they are very minimal settlements. I do not think there is one you could point to and say, "That really set a brand-new pattern for the industry or for that particular section of the economy."

Mr. Chairman: A good example is in British Columbia where, according to the letter from the Canadian Manufacturers' Association, 34 applications for imposed settlements were made in eight years. It has not been widely used.

Mr. White: That is interesting because at one time there was a very confrontational labour relations climate in British Columbia.

Mr. Pierce: One of the questions posed by Mr. Smith was the question of geography with respect to the arbitrators making some decisions that do not necessarily fit into the geographic location of a plant. There is always that fear. As a northern member, I know we have some great fears in the north that decisions made in the east all of a sudden become representative of what should be done in the north and they do not fit the picture.

There is a problem in the selection of the arbitrator, the two parties agreeing on who is the arbitrator, and both parties jockeying for the arbitrator who has historically come down in favour of one position rather than the other.

Mr. White: You will have some of that any time you have an arbitration board, but the ultimate decision rests with the minister if the two parties cannot agree on who the arbitrator ought to be. If you look at arbitration in this province, and a lot of public sector bargaining is controlled by arbitration, in most instances the arbitrators have been sensitive to the economics of the situation, regardless of where it was. If you go down this route, you have to have some faith in the people who are making these decisions.

Mr. Callahan: I come from a municipal background. I can remember times when we would sit around as a council and I would suggest it go to arbitration. They would all turn white, if you will pardon the expression, Mr. White, because they were concerned that the arbitration would result in a very unfavourable settlement for the municipality.

Mr. White: I think you are talking about a very different situation. You are talking now about having arbitration in place for everybody in a given industry.

Mr. Taylor: In the public sector.

Mr. White: Yes. You are talking about an arbitration that is taking the place of normal negotiations which can take place on their own if people

want to go that route. I think you are looking at a very different situation. I would hope the arbitrators in most collective bargaining situations would impose decent collective agreements, but there is no guarantee of that here.

Mr. Callahan: I got the impression that humans beings, being human beings, want to be steadily employed. That is the danger in any area where you are making decisions; that is, you are going to make those decisions that are going to win you more appointments as chairman of an arbitration team.

Mr. White: You are not looking at many full-time arbitrators being involved in this process, and some have to be agreeable to the employer and the union or the minister has to appoint them. We deal with arbitration every day of our lives in terms of grievance settlements. If you go down this road, you have to have some faith in the process and the people involved in it. That is all I can say.

Mr. Callahan: You need Solomon for hire.

Mr. White: I am not sure about Solomon, but you could get some people who would charge almost as much as Solomon would.

Mr. Pierce: I will ask you for a personal opinion. How do you feel about having a pool of arbitrators and just drawing the arbitrator who is next out of the pool?

Mr. White: Personally, I do not have any problem with it. The minister has a pool of arbitrators available. Some people will argue for an arbitration board. I do not have any problem with a single arbitrator. In many cases, arbitration boards just add costs for both parties involved. Personally, I have no problem with a pool of arbitrators.

Mr. Pierce: We used to experience as much delay in finally coming to a conclusion about who the arbitrator was going to be as we did in the actual arbitration.

Mr. White: The time limits here are fairly restrictive; people have to get on with it or somebody else will make the decision for them.

Mr. Pierce: That is right.

Mr. Mackenzie: I have three quick questions. First, in the bill as it is currently written, there is no doubt in your mind that the requirements under clauses 40a(2)(a), (b), (c) and (d) and the "frustrated" in the opening paragraph do constitute an element of bad-faith bargaining.

Interjection.

Mr. White: If he had not framed it that way, probably I could have answered him too. You are absolutely right, and having talked to people involved in labour relations practice and to people who have had experience on the Ontario Labour Relations Board, they share that view.

Mr. Mackenzie: Some of the employers do too.

Mr. White: So that you know where I come from, I do not just accept some legal interpretation of that. Some lawyers say, "That is worse." You have to look at the whole thing in its totality. I do not think there is any question, given the way it is worded, that is probably more difficult to prove than bad-faith bargaining today.

Mr. Mackenzie: The second question deals with a question Mr. Callahan was asking, which he has been logging throughout the past few days of these hearings. It is the theory that if we could get some definitive decision or explanation from somebody--I am not sure from whom--that this really does not mean bad-faith bargaining, could we live with it?

The problem I have with it is that every case is going to be different, and it does not say "bad faith" specifically anyhow, so I am not sure what the decision he wants means. I want to be clear about whether you think this could be lived with if we had some definition that indicates it is not bad faith.

Mr. White: I do not think you are going to find the definition that will keep it out of the courts and not be bad-faith bargaining. If it is not bad faith, there will be some other strict criteria, and then I think you are guaranteeing it goes to the courts.

12 noon

Mr. Mackenzie: The third question is your response to what I guess is a very strong case that has been made by the Canadian Manufacturers' Association, the financial institute, Mathews, Dinsdale and Clark and a number of others, that this legislation will fundamentally alter--I think those were some of the words we have heard--the balance of power between the parties and therefore there would have to be some other changes, including an automatic vote on certifications. May we have your response to that argument?

Mr. White: Those are not really new arguments used by those law firms. There is no question that this will affect some balance of power of lawyers who want to play around with first-contract situations, lawyers on both sides, if that is the case. Yes, it will and it should. But if it is fundamentally affecting the balance of power in collective bargaining, the answer is no. What you are doing is you are taking some of the power out of the system and handing it over to somebody else. That is what you are really doing here.

Mr. Callahan: Mr. White, you answered Mr. Mackenzie's second question differently from how you answered mine, at least I thought you did. I indicated that if there were some definitive way that you could get an interpretation of that legislation to demonstrate that it is not the old test of bad faith out is something less than that, would you accept that as second best.

Mr. White: I think I answered them both the same way. I do not think you can find that definitive way that would take it out of the courts. You just will not find it. That is the problem the drafters of the bill had. People said they did not want to have to prove bad-faith bargaining, so they sat down, wrote some language and now are trying to convince us that this in effect is better than bad-faith bargaining. However, in fact--

Interjection.

Mr. Callahan: Let us say there was a mechanism to refer that section to the Court of Appeal for a decision, which there is; subsection 19(1) of the Courts of Justice Act allows that to happen. If that definitive decision were made, would you be happy? I understand where you are coming from; you do not want the bad-faith test because--

Mr. White: I will not be happy unless we have access.

Mr. Callahan: Automatic access?

Mr. White: Automatic access.

Mr. Callahan: That is what I wanted to clarify. Contrary to what Mr. Mackenzie says, there are definitions of bad faith, as I am sure you will find if you check with your counsel, defined by the cases in municipal situations where bylaws are being attacked. I am sure there is a definitive definition of bad faith within the Ontario Labour Relations Board's decisions. It is a matter of malice aforethought, as it were, a deliberate attempt to avoid what should be taking place within the framework of the law. That is a simple definition.

Mr. White: I guess the question really is, do we want the legislation to be available to people in a difficult situation or do we want to have them prove it is difficult before it is available to them? If you get into that, you are getting into building a lot more barriers to building a collective bargaining relationship than you are if there is access.

Mr. Callahan: I know what you are saying--

Mr. White: Whatever you write here, somebody is going to have to go on the witness stand and go through all the recitation about collective bargaining and certification; employees and senior members of management will be called as witnesses. Then after all that, you say: "Now we are going to impose an agreement. We want you to live together." I am saying all that does is make it more difficult to do.

Mr. Callahan: When I look at strikes, such as these and others, I would think all you would have to do would be to read a brief précis of what went on and it would fall within the definition. It is clearly obvious that it belongs there.

Mr. White: Do you have to have an eight-month strike, go through 16 days of hearings and pull in employees and senior members of management to testify before the labour relations board to all those activities before we can determine somehow if it is bad faith or if they are frustrated? Do you have to do that before you get access to it? That is the problem I have with it.

Mr. Callahan: I understand what you are saying.

Mr. Pierce: I have a short supplementary. We talked earlier about whether this bill now relieves you of first-contract strike or lockout. I would like to get your opinion on whether the bill should do that, whether the bill should be triggered upon request by either party prior to a lockout or a strike and that a lockout or strike would not be a part of the mechanism to achieve a first contract without first going to first-contract legislation.

Mr. White: No, I do not think that is the way to go. If you are going that way, you are riding the other horse that says you want to do away completely with collective bargaining for first contracts. This bill is designed to get at employers who thwart the collective bargaining process. Those situations are in the minority, but they are very difficult in this province. If we do not correct them, they will increase in number. I do not think it should take away the right to conduct normal first-contract bargaining from unions and employers.

Mr. Pierce: What about the length of the strike?

Mr. White: As I said, if somebody wants to give you access, you should have it going in. If somebody says you have access after a strike of two or three weeks, the legislation stops it anyway. If you have access the way we want it, you will have that availability.

Mr. Chairman: If there are no other questions, Mr. White, Mr. Nickerson, Mr. Gill, thank you for appearing before the committee. We appreciate hearing your views.

The next presentation is from the Ontario Public School Teachers' Federation. We have with us Mrs. Mary Hill, the president, and also David Lennox, the deputy secretary of the federation. We welcome you to the committee. You are the first of two teachers' groups we will hear from today. We look forward to hearing your views.

Mr. Callahan: Are they in the right committee?

Mr. Chairman: Yes. Do not discourage them from appearing here, either.

ONTARIO PUBLIC SCHOOL TEACHERS' FEDERATION

Mrs. Hill: I will speak to you for a moment and then I will ask Mr. Lennox to take you through the specifics. This is a new experience for us, and I must say I had not expected I would ever be sitting in the same chair as Bob White had been sitting. I did not expect I would ever be president of a trade union, but indeed that has happened.

I am one of those rather funny people who is president of a teachers' federation that represents slightly more than 14,000 male elementary school teachers. We also have about 2,000 voluntary members, women like myself. Those people belong to branch affiliates and collectively bargain under the School Boards and Teachers Collective Negotiations Act.

The other side of my group is made up of occasional teachers and in late March we received trade union status. We had been waiting more than a year for that to happen. We have our first group certified, the Kent occasional teachers. You can well imagine now excited we were when we saw this bill come forward and how very pleased we are such a bill is here.

We expect to be negotiating about one dozen collective agreements for these occasional teachers. We expected we would run into some difficulties with school boards, trying to negotiate a first agreement. Many of the school boards will not want to recognize a group of teachers who have trade union status. This legislation is very welcome to us. We believe it will alleviate the situation and encourage school boards to go to the bargaining table and negotiate in good faith for a first contract. We are grateful.

12:10 p.m.

Mr. Lennox will take you through our suggestions on the bill.

Mr. Lennox: Instead of taking the bill apart clause by clause, the Ontario Public School Teachers' Federation has tried to deal with it from four or five specific items. I will take you through the access to arbitration and then I will deal with the arbitration itself, the time lines that are set

down, the concept of similar functions and comparability and the implications for the Ontario Labour Relations Board proceedings.

I found it interesting to listen very carefully to the last group, because I thought I was listening to my presentation with regard to the access to arbitration. Our federation has studied subsection 40a(2) and has analysed it at some length as a test of bad-faith bargaining. We believe there is a complicating of the situation with the way subsection 40a(2) is written now.

We believe there must be a no-fault approach to access to arbitration. We believe there must be a time line set up that says to the individuals, both in the employer and employee groups, that here is the process that is defined. After a reasonable effort has been made and a reasonable length of time has transpired to attempt to get first-contract negotiations concluded, either party or both parties jointly should be able to come to the labour relations board and submit to a test, and the test has to be one of reasonable effort and time. They should then be able to have automatic access to the arbitration procedure.

I will come back to that in just a moment, but I sincerely believe what occurs is that entrenched positions build up and bitterness commences. If we have to get to that side where we have the lawyers controlling the situation, and where we have the legalities and technicalities argued over and over for a great length of time, we do several things. First, we make a group of people a fair amount of money; second, we can exacerbate the situations that are already deteriorating for a great length of time; and, third, we end up with words and entanglements of phrases that do not solve problems.

I recall going before the labour relations board for our first certification as a trade union. The length of time that it took our situation to get before the labour relations board was very short. Once it got there, the process was very complex. I will not expand upon that any further.

In the last paragraph of page 2, we share our concern that access to first-contract arbitration should not be left to the discretion of the Minister of Labour. We believe it has to be another group. It could be the labour relations board, but not solely the Minister of Labour. The commitment by the present Minister of Labour (Mr. Wrye) on now discretionary power under this section will be used by him will not, we suggest, dictate how future ministers may choose to implement this power.

We have the present Minister of Labour saying, "No problem; we will institute this arbitration and I will follow these guidelines." Ten years from now, those guidelines will all be forgotten and there will be a different political temperament in the province. The Minister of Labour may decide at that time that he will not put any first-contract legislation into place; he will let them go out on a lengthy strike to sort this out. We do have some concern with regard to this.

On page 3, the second paragraph, we have set out what we believe is a more suitable criterion for access to arbitration, that a reasonable amount of time has been spent by the two parties in attempting to negotiate a collective agreement. We do not believe eliminating subsection 40a(2) will create a disincentive to negotiate. We have analysed at length whether first-contract legislation is going to be a disincentive to effective negotiation of a first contract with regard to our occasional teachers and the boards of education.

We do not see that at all. We see this as being a last resort when all else has failed. Effective negotiation should go on and a strike may start,

but we believe we should have access before we have to go to a strike and access during a strike. The situation is that we do not see this bill in its present form, which we think is a very positive step forward by the government, as a disincentive to negotiate.

We are concerned about one particular word in subsection 40a(2) and that word is "frustrated." We find that a very subjective word and we recommend that the word "frustrated" be replaced by the word "unsuccessful," which simply says you have not been successful in getting a first contract, rather than you have become frustrated. "Frustrated" then becomes a pretty subjective bad-faith bargaining word. We should take a look at the concept of a word that can be rather more objectively measured at that stage.

On page 4, we deal with arbitration itself. We believe the arbitration process as set out in Bill 65 is both sound and comprehensive. We certainly believe the drafters of the legislation have set up a good process. It is our understanding under the amended subsection 9 that the arbitration board will have the right to hear oral presentations and to request written submissions as well as to call witnesses. All three of these are important to maximize information and make sound judgements.

The other aspect we trust is guaranteed in subsection 9 is that both parties are guaranteed the right to make presentations and submissions and to have the opportunity for rebuttal. The submissions, both written and oral, cannot be made in isolation of a response from the other party, and the arbitration board must have maximum information from both parties and hear what each party has to say about the other party's submission before it can make a wise and just decision.

We also believe there is equity in the setting out of the remuneration and expenses of the board of arbitration in subsection 8. This is a familiar process to our teachers' federation when we get into grievance arbitrations and the paying of the sidepersons of the arbitration and the chairperson of the arbitration. We support that payment schedule.

The third element we share with you is the time lines. Since 1975, the teachers' federations of the province have worked under the School Boards and Teachers Collective Negotiations Act. As such, we have had very definitive time lines for the fact-finding process and for all other processes that can lead to a collective agreement or to an impasse, and to a strike in the very few cases that have occurred in the province.

Once our federation came before the Ontario Labour Relations Board, we were confronted with a new experience in delays, and I mean lengthy delays. We find it unacceptable that our first day of hearing before the labour relations board was in January and the second day of our hearing was at the end of May. This was to get everybody's calendar to agree. We had the OLRB, the lawyer for our federation and the lawyer for the board of education. Everybody had to take out his calendar. It is unfortunate that we let the calendars of these people delay situations.

12:20 p.m.

When we come down to first-contract arbitration, if it is to be an effective piece of legislation, we cannot permit such delays in any way; we have to have reasonable time lines for first-contract arbitration, and any of these cannot be set up for the convenience of the law profession. They say either: "Yes, I can take that case; I can be there for a given day, or a

member of my firm can be there on a given day," or "We are just too busy to take that case. Let us get somebody else in there." Open-ended time lines and inordinate delays can only add to already frustrated and discordant relationships. Our job there is to solve it.

The federation's position is that once the defined time lines are set up and once the process is started, they must be adhered to and followed. Far too often legalities and technicalities interfere with and interrupt the process. I believe that if we are going to get into first-contract legislation, we cannot allow those legalities and technicalities to interrupt a process. They must know that there must be a time line and that at the end of that time line we are going to be out of this.

Concerning the aspect that subsection 40a(17) of the bill sets out with regard to the extension of the time line, again we commend to you our recommendation that any extension of the time line should be a defined extension. It could be extended, yes, but we must know how long it is going to be extended--for another 30 days or another 15 days. The question is that it cannot be an open-ended extension. We are not going to go anywhere with that type of situation.

On the idea of analysing similar functions, we have to commend the parties who drafted this piece of legislation. We are pleased that you have instructed that similar functions and similar circumstances may be taken into account, because this is going to provide a scope and an area of analysis that are going to be very helpful to the arbitration board as far as the historic relationship is concerned. In many of these situations where this is a first contract, the arbitration board will have to go back and analyse a historic relationship between the unorganized employees--now the organized employees--and with other people doing similar work.

We are concerned, however, with the possible overtones of clause 40a(15)(a), since subjective judgements about reasonable efforts will have to be made. We believe first-contract arbitration must be established to resolve difficulties without at the same time creating new difficulties, and therefore we recommend to you that there not be any punitive measure taken in determining first-contract arbitration. We recommend that clause 40a(15)(a) be deleted. We are going to have to get on with living with these situations.

I might also point out at this time that we are in strong agreement with the two-year time line. Once the first collective agreement has been ratified, two years are going to be required to re-establish working relationships and to live with the collective agreement before we reopen it. In a lot of the situations in our area with regard to occasional teachers, it is going to take the occasional teachers, the contract teachers, the school principals, the boards of education and the administration that length of time to adjust themselves to a framework within which they have never had to work.

Last, but certainly not of least implication to us, is the implication for the Ontario Labour Relations Board proceedings. To put it succinctly, we think that if we are going to add to the work load of the Ontario Labour Relations Board, we had better be out looking at hiring and increasing the staff there. Right now the staff there, I must say, do a solid job in the tasks they are assigned, but the backlog at the Ontario Labour Relations Board is frustrating. It is frustrating to employee groups, to federations, to trade unions and to employers.

With regard to writing judgements and making decisions, we cannot expect people to be out there working five days a week to do something like that and

to have no time to write the decision, then to go back for the next five days and work again. The writing of the decisions gets backlogged. We have to make sure that organization, a very important group in trade unionism, the Ontario Labour Relations Board, must have the personnel to function efficiently, effectively and quickly to resolve these situations.

We support the thrust of first-contract legislation. We urge the standing committee on resources development to study and incorporate our recommendations for amending the bill. We believe it should be modified and proceed expeditiously through the Legislature to become an important principle within Ontario's system of justice.

Mr. Chairman: Thank you, Mr. Lennox and Mrs. Hill. Several members have indicated an interest in engaging you in debate.

Mr. Callahan: To begin, on page 2 you talk about the discretionary power under subsection 40a(1). I have never read it that way. It appears to me that what happens is either the minister may decide a conciliation board should be appointed or it is triggered by a conciliation board decision being made. I do not see where you find it is a discretionary power, other than the discretion of whether or not to appoint a conciliation board. Is that what you are talking about?

Mr. Lennox: Yes. We read that as being a discretionary power. I think we should go right to a conciliation board. When the board has reported, that is going to provide the information that is going to move and provide evidence that access to arbitration will have to be granted.

Mr. Callahan: I agree with you that time lines are important. Let us say the minister, in looking at the facts, decides there is no point in going to conciliation. What you are saying is that there would have to be conciliation in every case. In effect, if you took away the minister's discretion, you would perhaps have a virtual waste of time, and not only a waste of time but also a waste of this increased staff you tell us we are going to need, if there is no purpose behind it. I think that is really the purpose of that alternative.

Mr. Lennox: I do not believe it is a waste of time. In the negotiation process we are familiar with, the teachers deal with a fact-finding process. We are very familiar with the fact an external person comes in as a fact-finder and provides both parties with an analysis of what is going on and some guidance and hopes to resolve it to get a collective agreement. I believe the conciliation process should serve in the same vein.

At the end of that time, we have the facts gathered together. Then we can take a look at whether we should move towards arbitration, or whether they have made a reasonable attempt to negotiate and where some faults lie--and I do not mean the big faults, but just what is blocking it and the barriers in the situation--or whether they need to negotiate more before they have access to arbitration. I think in all these cases a conciliation board would be an asset.

Mr. Callahan: You recognize the purpose of this legislation is to deal with those instances where one side is refusing to recognize that a union has been certified.

• Mr. Lennox: That is right.

Mr. Callahan: In that case, it would be a shame to set up a conciliation board where the parties could just sit and stare at one another.

Mr. Lennox: Yes. There may have to be an either/or there.

Mr. Callahan: My reading of subsection 40a(1) is that the minister may make that decision and it is not one that may change depending on who the future minister is. In any event, I recognize what you are saying.

Your brief is interesting because, at least in my tenure on this committee, you are the first person to suggest something for the word "frustrate." Is that correct, Mr. Chairman? I do not believe that has been raised before.

Mr. Chairman: It has been raised.

Mr. Callahan: The point has been raised that people are not comfortable with the word "frustrate," but nobody has ever suggested an alternative wording for it. I thank you for that.

Mr. Mackenzie: The steelworkers did.

Mr. Callahan: Did they? All right.

Mr. Taylor: I think the minister is ready to move on that one.

12:30 p.m.

Mr. Callahan: The other point I find attractive is the question of the time limit under subsection 40a(17), that you would add the words there "but not beyond 30 days."

What if it were not the fault of the parties but of the process that certain time limits could not be met? Would you not see that as taking away certain rights that were meant to be here for those parties, through the mechanism of one party being a little craftier than the other and sort of slowing them down or lulling them into a sense of false security?

Unamended, that section provides a breadth in which they can accomplish that type of situation. I think that is why the minister has retained the power to enlarge when the parties themselves do not agree with it. You can appreciate that without the minister's intervention under certain circumstances, if the parties cannot agree to an extension, that is the end of it. If you put a further restriction of 30 days on it--I see your reasoning for doing that for the timeliness of it--you may create a situation where someone's rights could be taken away as a result of sleeping on it.

Mr. Lennox: I cannot think of a situation where time beyond 30 days is going to prove to be beneficial.

Mr. Callahan: That may be. All I am saying is that if you put that in there, you may very well be taking away someone's rights. They may get euchred because they have been led to believe in a certain process taking place, and they have let the time slip by.

Mr. Lennox: Not to debate with you on this point, I do not understand someone's rights being taken away.

Mr. Callahan: Let us say the process was not resorted to in the various time limit sections by one or other of the parties. What you are saying is that once 30 days have elapsed, there would be no ability for either the parties by agreement or for the minister to intervene and enlarge those rights if "not beyond 30 days" is added.

Mr. Lennox: No. What I am saying here is that once the arbitration process has started, if something comes up and the minister can extend the time limit set out--I do not see any reason to extend the time limits in the first place. However, let us say there is. The arbitration board decides there has to be this great search for information for some reason. I am simply saying we are in a process now that is going to resolve a deadlock, and that process must have defined time lines so the parties know when it is going to conclude. We cannot have an interruption for an unannounced period of time. This simply is going to add to the frustration and is not going to solve anything.

Mr. Callahan: Let us look at it from either side. It does not necessarily have to be the employer. It could be the employees who wanted that additional largess in terms of timing. They may want to gather some more information for the benefit of the board. What you are saying here is that the guy on the other side could say: "Ha, 30 days has gone by. You are out of luck. The process is dead. You cannot have that extension."

Mr. Lennox: The process is not dead. The process just is not delayed.

Mr. Callahan: In any event, the information would not be available, and I have some difficulty with that. I understand that your reason for wanting it is the time limits.

The final point is that I understand from a group we had here before that the part-time or supply teachers had been recognized. I may be wrong in this, but I thought they had been recognized by the Ontario Labour Relations Board and that the decision is before the Divisional Court on an application regarding whether there was jurisdiction for the board to--or is it the reverse, that a group has been recognized under the other process that regular teachers are recognized under and that is the one that is before the Divisional Court for consideration?

Mrs. Hill: It is all very complicated. What has happened is we asked for trade union status. Windsor vocational teachers had been organized and went to the Ontario Labour Relations Board to ask for trade union status. The Windsor board did not want to see us get it and argued that because we had a number of males in our group and that they really were statutory males, we were a discriminatory organization. It took the Ontario Labour Relations Board more than a year to determine, in a 75-page decision, that we are not. As far as we are concerned, that case stands. We have just received certification for our first group in Kent.

Mr. Callahan: As I said, we did get a brief a couple of days ago.

Mrs. Hill: From the Ontario Secondary School Teachers' Federation.

Mr. Callahan: Yes. They told us that one or other of those things had happened: either the supply teachers had been recognized under the School Boards and Teachers Collective Negotiations Act and that was under appeal to the Divisional Court, or the alternative--was the alternative the latter?

Mr. Taylor: Yes.

Mr. Callahan: With the latter, you realize there is a secondary ground which the OSSTF put to us; we would have to amend the Labour Relations Act to allow teachers--

Mr. Taylor: No. You mean Bill 100; that is the School Boards and Teachers Collective Negotiations Act.

Mr. Callahan: Under the Labour Relations Act, is there also not a provision that teachers, lawyers, doctors and so on cannot--

Mrs. Hill: Correct.

Mr. Callahan: You require an amendment to that. How did you get past that in getting your certification?

Mr. Lennox: We do not disclose that to anyone.

Mr. Callahan: It is a secret, is it? You have a 16-year patent on it.

Mr. Lennox: On a serious note, the dichotomy occurring with regard to the School Boards and Teachers Collective Negotiations Act and the Labour Relations Act is due to the fact that the government has never moved to move the occasional teachers under the one.

Mr. Callahan: Because of that, they do not fall within that exclusionary section.

Mr. Lennox: That is correct.

Mr. Callahan: How interesting.

Mr. Lennox: Yes. Since they do not have a contract and are casual employees of the board of education, they have never had any type of protection or organization in the history of Ontario. In Alberta, for example, all the occasional teachers are members of the Alberta Teachers' Association; they are totally under the umbrella of that organization.

The occasional teachers in Ontario, along with other groups such as teacher aides, have never been organized and have no protection. The first protection advanced for occasional teachers has been the organization done by OSSTF, our federation and the Ontario English Catholic Teachers' Association on behalf of the Catholic occasional teachers. This commenced two years ago. It has taken two years to wind its way to this point.

Mr. Callahan: Could we eliminate all those extra steps by saying that casual teachers fall under the School Boards and Teachers Collective Negotiations Act and by including therein first-contract amendments?

Mrs. Hill: You could. Perhaps I can explain to you the problem we would have. Our parent, the Ontario Teachers' Federation, will be here later this afternoon to ask you to do precisely that. We too agree philosophically that those teachers should be brought under the School Boards and Teachers Collective Negotiations Act. We have asked the minister for a change in the definition of a teacher. It really needs this change to do it.

It leaves my organization in a real dilemma. You must recognize that about 98 per cent of the occasional teachers are women. If they were to come under the School Boards and Teachers Collective Negotiations Act and become

members of the Ontario Teachers' Federation, which would be what should happen to them, they would be assigned to an affiliate by a bylaw in the Ontario Teachers' Federation. Since they are women, they would be assigned as members to the Federation of Women Teachers' Associations of Ontario. Therefore, after spending considerable time unionizing and organizing them, we would lose them.

Mr. Callahan: They would probably be under the subsection 15(1) application of the Charter of Rights. The way you have gone about that is interesting. I am wondering whether part-time lawyers and part-time doctors might be able to have themselves certified.

Mr. Ramsay: Possibly part-time politicians too.

Mr. Callahan: Thank you very much.

Interjections.

Mr. Callahan: Most lawyers should be certified anyway. I say that as a member of the profession.

12:40 p.m.

Mr. Mackenzie: I have two things. First, with the discovery procedure you have, I recognize you may need something a little different; but under subsection 40a(1), what happens is a conciliation officer himself goes in and then reports back quickly to the minister that there is or is not reason for a board. I do not think there has been a board appointed in Ontario since about 1978 or 1979. Indeed, it has got to the point where a lot of people wonder why it is even in the legislation. There may or may not be reason for it for your group. I do not think it is a major stumbling block. It literally is just a rubber stamp once the conciliation officer reports to the ministry. That decision was arrived at, and it was pretty generally agreed by both management and the unions that the conciliation board was nothing but a delay in the procedure.

I raise another thing that I guess we have to deal with. I do not know whether it is specifically to do with the bill. You mentioned problems you have with delays at the board. That is something some of us know all too much about. Are you of the opinion that the chairman of an arbitration board should have the authority to set certain dates that the parties themselves then have to agree to? There has been a working committee at the Ontario Federation of Labour and there is some work we have done trying to speed up procedures at the board. Apart from the argument that obviously more people are needed there, many of us have a feeling that the chairman of the board should automatically set aside dates rather than have everybody looking for a calendar. That is the only way we are going to speed up the procedures. What is your reaction to that?

Mrs. Hill: Excellent idea.

Mr. D. R. Cooke: Except it would surely favour the union lawyers, would it not?

Mr. Mackenzie: Why?

Mr. D. R. Cooke: Because there would be fewer of them and they would be able to accommodate themselves more easily to the dates.

Mr. Mackenzie: I think it is one of the many things that Judge Abella was looking at. They recognize at the board that there is a real

problem. Senior board members tell me that if the chairman is not going to be seized of the authority to set the dates, we are not going to resolve this problem everybody is outlining to us.

Mr. Lennox: In brief response to that, Mr. Mackenzie, I can appreciate Mr. Cooke's comment. The answer is that I believe the chairman of the hearing should set dates. They should set one, two or three dates; I do not believe one is appropriate. They should say: "Here are the next three dates in the next 30 or 60 days. You two lawyers go off in a corner and come up with an agreeable date, one of these three."

Mr. Mackenzie: Or consecutive dates where it is going to be a longer hearing.

Mr. Lennox: That is fine; it could be two or three days in a row. When it comes down to the fact that we went from January 25 until May 23, I find that to be a rather--especially when we have our occasional teachers waiting, the group we have unionized; it is a very interesting group in that it fluctuates. They are not a constant group. They are more constant than they were 10 years ago, but they are not a constant group. We have more than 2,000 occasional teachers, whom we have organized, waiting for this first decision on the trade union status.

This is a classic case of where a four-month delay and then one year to write the report leaves the trade union, or the federation in our case, in a dilemma of trying to keep up the morale of new members and of the organization. The next group says to us: "We would like to be organized. Show us what you have done so far." We say, "We cannot show you anything because it is in the middle of a labour relations report at this time."

Mr. Mackenzie: If you think your time frames are long, take a look at a number of others, including the garbage strike in Toronto, where it is three and a half years now. That is exactly what the chairman has finally done to get the decision.

Mr. D. R. Cooke: I do not have a question; rather, I have an apology to Mr. Lennox that Ms. Smith and I were exclaiming when you came to paragraph 4 of page 3. I wish to inform you that we have been struggling with that word. Maybe you have answered our problems.

Mr. Chairman: Are there any other comments or questions?

Mr. Taylor: I have one, if I may, because of this afternoon's people coming in, the Ontario Teachers' Federation. I was interested in the going of oxen and your comments about bringing all teachers under a single umbrella, whether they are or occasional or otherwise. Can you enlarge on your self-interest in that situation?

Mrs. Hill: In the main, the occasional teachers are women. Therefore, if they became members of the Ontario Teachers' Federation, which we believe is the best thing that could happen--

Mr. Taylor: Okay, we accept that. That would be the ultimate.

Mrs. Hill: That would be the perfect thing to happen.

Mr. Taylor: Okay.

Mrs. Hill: Within the Ontario Teachers' Federation, we have bylaws that assign you to an affiliate. All the elementary male teachers are assigned

to my affiliate, all the women are assigned to the Federation of Women Teachers' Associations of Ontario, the secondary school teachers to the Ontario Separate School Teachers' Federation, the Catholic teachers to the Ontario English Catholic Teachers' Federation, and the French teachers to l'Association des enseignants franco-ontariens.

If they became members of Ontario Teachers' Federation, it would say, "These are elementary women teachers; therefore, they must belong to the FWTAO." Obviously, since we spent the money organizing and representing them, we are delighted to have them--they are real women members of our organization --but we would lose them.

Mr. Taylor: Would that not be a noble sacrifice?

Mrs. Hill: Not as noble as I would like to make. A number of women, like myself, would like to belong as full statutory members of the Ontario Public School Teachers' Federation. We believe men and women elementary teachers would have been much better off in 1944 if they had all been placed into the one federation.

Some of you have heard me talk about elementary school funding. I claim that had elementary teachers been together in the group, we would not be suffering the gap between elementary and secondary funding. It has not made us as strong as we could be.

There are number of women, like myself, who want to belong to the Ontario Public School Teachers' Federation, but the OTF will not allow it. That matter is in the courts. A woman principal from Windsor has taken our organization to court, saying we will not allow her to become a full member. We are hoping the courts will order us to take her as a full member.

Mr. Taylor: Thank you very much.

Mr. D. R. Cooke: I have a supplementary to that. What is the contrary argument? Why do some wish to--

Mrs. Hill: The women teachers who wish to maintain the Federation of Women Teachers' Association of Ontario feel that at this time women teachers require an organization of their own. They make a very strong argument that women have not had the positions of added responsibility; therefore, they are there to ensure they get ahead. They support affirmative action; I do too. I am just as strong a supporter of affirmative action as they are.

I believe that men and women have to be together to get women into their rightful places and that we have to work together. We can convince women, but we also have to convince men. It is a difference in philosophy.

Mr. Chairman: You have to remember that Mr. Taylor is viewed by members of the committee as the noble savage of this committee.

Mr. Ramsay: Mr. Savage.

Mr. Chairman: Now, now. The committee thanks you for appearing before us. We do appreciate your appearance here.

Mrs. Hill: Thank you very much.

Mr. Chairman: We are adjourned until 2 p.m., when the International Union of Operating Engineers will be before us.

The committee recessed at 12:53 p.m.

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R-57

STANDING COMMITTEE ON RESOURCES DEVELOPMENT

LABOUR RELATIONS AMENDMENT ACT

TUESDAY, APRIL 1, 1986

Afternoon Sitting



STANDING COMMITTEE ON RESOURCES DEVELOPMENT

CHAIRMAN: Laughren, F. (Nickel Belt NDP)

VICE-CHAIRMAN: Ramsay, D. (Timiskaming NDP)

Callahan, R. V. (Brampton L)

Gordon, J. K. (Sudbury PC)

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McGuigan, J. F. (Kent-Elgin L)

Pierce, F. J. (Rainy River PC)

Smith, E. J. (London South L)

South, L. (Frontenac-Addington L)

Stevenson, K. R. (Durham-York PC)

Taylor, J. A. (Prince Edward-Lennox PC)

Substitutions:

Cooke, D. R. (Kitchener L) for Mr. McGuigan

Gillies, P. A. (Brantford PC) for Mr. Gordon

Clerk: Decker, T.

Clerk pro tem: Arnott, D.

Witnesses:

From the Labourers' International Union of North America, Ontario Provincial District Council and the International Union of Operating Engineers, Local 793:
Minsky, A. M., Counsel; with Koskie and Minsky
Stang, D., Assistant Business Manager, LIUNA

From the Ministry of Labour:

Failes, M., Policy Analyst, Labour Policy and Programs

From the Ontario Teachers' Federation:

Matte, G., President

Wilson, M., Secretary-Treasurer

From the Ontario Public School Trustees' Association:

Jakub, J., Director, Personnel Services

Morrow, K., President

ERRATUM: In issue R-55 all references to Mr. Hunter should be to Mr. Foucault.

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Tuesday, April 1, 1980

The committee resumed at 2:10 p.m. in room 228.

LABOUR RELATIONS AMENDMENT ACT
(continued)

Consideration of Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: The committee will come to order. The first group this afternoon is a combination group, and I hope they will explain that. We have the Labourers' International Union of North America, Ontario Provincial District Council, and the International Union of Operating Engineers, Local 793, in a joint brief. Perhaps you can explain the link between the two organizations.

Welcome to the committee. Mr. Minsky, would you introduce your compatriots?

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA,
ONTARIO PROVINCIAL DISTRICT COUNCIL AND
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793

Mr. Minsky: Mr. Chairman, on my right is Ernie Ford, the labour relations manager of the International Union of Operating Engineers, Local 793. On my left is David Strang, a lawyer and the assistant business manager of the district council of the Labourers' International Union.

The brief is submitted on behalf of the labourers' council and on behalf of the operating engineers union, Local 793. These are both large unions in Ontario, operating primarily in the construction industry but to an extent outside of the construction industry. They have a certain common interest in presenting this one brief to you almost as a voice from the construction industry because, by virtue of subsection 40a(18) of the bill as currently drafted, this new legislation does not apply to the construction industry.

These two large unions--the labourers, which exercises a province-wide jurisdiction through its locals, and Local 793, which in itself is a province-wide local of the operating engineers and is involved in all sectors of the construction industry--have joined forces, retained me to come before you and will submit very emphatically that there is no good reason to exclude the construction industry from the purview of Bill 65.

Let me basically introduce the interests of these particular unions by reference to the brief that I have filed with you this afternoon. First, the Labourers' Ontario Provincial District Council has been certified by the Ontario Labour Relations Board and is a certified council of trade unions. It consists of the 15 local unions of the Labourers' International Union of North America who operate in Ontario. It has a total membership through its locals of some 25,000 workers. It was codesignated back in 1978 by the then Minister of Labour as the employee bargaining agency for purposes of bargaining in the industrial, commercial and institutional sector of the construction industry.

If I can just pause for a moment, that is not what brings us here, as I will point out in some detail in a moment.

The constituent locals of the council, as well as the council itself, are party to or bound by collective agreements which cover all of the sectors of the construction industry, namely the industrial, commercial and institutional sectors, which as a short form I will call the ICI sector, residential, sewers, watermains, roads, heavy engineering, landscaping, pipeline and electrical power systems. Those are all of the sectors of the construction industry as defined by clause 117(e) of the Labour Relations Act. By the way, that definition of "sector" under the Labour Relations Act is at page 3 of the brief.

2:10 p.m.

Labourers' local unions are also involved in bargaining for workers of municipalities, manufacturing, lumber yards, etc.

Local 793 is the province-wide local of the International Union of Operating Engineers. These are the workers who operate the heavy construction equipment--the crawlers, the dozers, the loaders, the scrapers and the rest of it--on construction sites right around the province. The local is also codesignated as an employee bargaining agency in the ICI sector. It, as a local union, represents about 8,000 construction workers in the province and, as is the case with the labourers, covers all the sectors of the construction industry as well as a lot of nonconstruction work involving municipalities, pits and quarries, railroad maintenance, manufacturing, scrapyards and so forth.

The labourers and the operating engineers are two of the main civil trades in the construction industry across North America. These unions are not just centred in Ontario; they operate across North America, in the provinces of Canada and the states of the United States. They are associated with the American Federation of Labour and Congress of Industrial Organizations. Those two unions, the operating engineers and labourers, to a very large extent make up all of the construction in certain of the construction industry sectors. For example, with sewers, watermains and roads, you will find that those two trades predominate in those types of sectors.

Although they are vital, they do not particularly predominate in the ICI sector, the residential sector, the electrical power system sector, etc. They are civil trades.

The position of these two unions and the people they represent on Bill 65--and I would like to make this quite clear at the outset--is that they wholeheartedly support the initiative of first collective bargaining arbitration, as you find in Bill 65. The reason they are here today is that in terms of their construction activities they are excluded from the ambit of the bill by subsection 40a(18).

Subsection 40a(18), on page 12 of the bill, is very short and perhaps I can read it. "This section does not apply to the construction industry."

These unions respectfully submit that their members require the protection and the benefits of Bill 65 in respect of their construction activities to the same extent as those unions and members who are active in the rest of the economy, and that to deny the benefits and protections of Bill 65 in the manner contemplated by subsection 40a(18) is not founded on any

proper labour relations basis, to say nothing of the fact that in our respectful view it very well may violate section 15, the equality provision of the Canadian Charter of Rights and Freedoms.

Those are the two themes we wish to develop with you this afternoon. There is no good reason to exclude the construction industry from the bill. I have no idea why it is excluded from the bill. I cannot assist you in answering that question if you ask it, and similarly--or perhaps even additionally--it very well may violate the equality provision of the Charter of Rights. Simply put, it violates that provision, by the way, because it is treating workers in Ontario in the same situation, i.e., unable to get a first contract, differently for the purposes of first-contract arbitration.

Mr. Taylor: On our initial briefing, we were told that the exclusion was put into the legislation because of province-wide bargaining in the construction area. I point that out to you. You may want to pursue just what negotiations took place between you and the ministry. I was of the view that this was a settled matter and it was not contentious at all.

Mr. Minsky: No.

Mr. Callahan: I think the ICI people are going to be just the ones outside of that.

Mr. Minsky: That is correct. I deal very specifically with that in the brief.

Mr. Chairman: I suggest you go ahead with the brief. The brief deals with that, so I think it is best that you go ahead through it.

Mr. Minsky: On page 3, regarding bargaining in the construction industry, we almost anticipate that question by explaining the situation under the so-called designation legislation which covers industrial, commercial and institutional sector collective bargaining, and also the accreditation legislation which also impinges. Our thesis will be that, under the ICI sector or sectors where there is an accreditation order--and I will explain in a moment what that is about--this bill would have no relevance at all. It is not necessary; it is not appropriate; it has no place.

Our thesis is that there is a wealth of bargaining in the construction industry going on every day across this province, in the roads sector, the sewers sector, the electrical power systems sector, the residential sector, that is not affected by ICI designation legislation or by any accreditation order and is somehow out in the cold. Our wish is not to disturb designation or accreditation and make this amenable to those regimes; not at all.

This bill should not apply to accreditation and/or designation. What it should do is recognize there is a whole lot of collective bargaining and construction activity outside of the ICI sector and outside of any accredited sector--I will explain in a moment what I mean--and there is no reason to exclude those other areas of construction industry labour relations from the ambit of Bill 65.

Clause 117(e), which I mentioned a moment ago, defines "sector" and sets forth a number of them, including the ICI, residential, sewers and watermain, roads, heavy engineering, pipeline and electrical power systems sectors. To appreciate the necessity and desirability of coverage under Bill 65, it is important to distinguish between ICI and the other sectors of the industry.

On page 4 of the brief, I briefly précis the amendments of 1978 to the act, which brought in the designation legislation but cover only the ICI sector. In fact, this legislation makes the point of dealing with the labourers' council, which is on my left, and Mr. Ford, the operating engineers, were co-designated as employee bargaining agents in respect of the ICI sector in 1978.

We end up making the point, at the bottom of that first paragraph on page 4, that under designation legislation there is no need for the protection accorded by Bill 65 for employees in the ICI sector of the construction industry. Beyond that, we point out the scheme of accreditation, which is in sections 125 to 134 of the act--this became law in 1970, by the way--and under orders made for accreditation, Bill 65 also would have no application, for the simple reason that, as is the case with designation, where an employees' organization has been accredited by the labour board under section 127 of the act, subsection 128(4) provides that the existing collective agreement with the accredited employer group is automatically binding upon any employer for whom the union has or obtains bargaining rights. It works just like designation. There is no bargaining if there is an accreditation order.

My point then becomes that the vast majority of the accreditation orders that have been granted over the last 15 years, in respect of the ICI sector--i.e. they were granted prior to 1978, obviously not since--are now subsumed into the scheme of province-wide bargaining and are void in so far as the ICI sector aspect is concerned.

If you look at the collection of accreditation orders issued by the board over the last 15 years, what is left are very few existing accreditation orders. In fact, there are only two of which I am aware that affect my clients here. Each of my clients is affected by a pipeline accreditation order and therefore for the pipeline sector Bill 65 has no relevance. Labourers local 183, a constituent local of the labourers' council, is affected in what we call board area 8, which is where the municipality of Metropolitan Toronto is affected by an order in the heavy engineering sector. Period.

What does that leave? The sewer and watermain sector, the road sector, the electrical power systems sector, the residential sector and whatever else is left for operating engineers and labourers. In other words, what you will find is that there are one or two accreditation orders outstanding where Bill 65 is not of any importance, and there is the ICI legislation.

I hope I have answered Mr. Taylor's point. It is a long-winded way of doing so, but it is important to show the configuration of sectors in the industry and that designation deals only with the ICI.

2:20 p.m.

Mr. Callahan: Understanding this is at the very heart of this whole thing, are you saying that the definition of "sector," which I gather gives these rather different rights to the construction industry, is severable in that the only accreditation orders that have been obtained are those in the industrial, commercial and institutional sector?

Mr. Minsky: Are you talking about accreditation now?

Mr. Callahan: I do not know what it would be called, but it has the benefit of sections 137 to 151 of the act.

Mr. Minsky: No. That is designation. I am using two words. I am glad you called me out on that. I want to be very clear so that you understand my use of the words. Designation legislation was introduced in 1978 and covers only the ICI sector of the construction industry in Ontario.

Mr. Callahan: What section of the Labour Relations Act is that?

Mr. Minsky: It is sections 137 to 151.

Mr. Callahan: They do not refer to the general definition of "sector" and include the residential sectors.

Mr. Minsky: No, sir. If I were to take you through sections 137 to 151, you would see they make it quite clear that they are talking only about the ICI sector of the construction industry.

Mr. Callahan: Why did they define "sector" under clause 117(e)?

Mr. Minsky: That defines all the sectors. These are divisions of the construction industry. Forget about bargaining rights for a moment. These are just divisions of work. The ICI sector is a division of work, meaning the work that goes on for industrial, commercial or institutional structures. That is the ICI sector. It is covered by designation legislation starting in section 78 and through sections 137 to 151 of the act. The whole point is that there are others sectors or divisions of the construction industry that are totally unaffected.

Mr. Gillies: By sections 137 to 151?

Mr. Minsky: Exactly; by the designation legislation.

Mr. Gillies: Can you give us some scale on that, Mr. Minsky? For example, of all the people working in construction, how many would be covered under the province-wide bargaining and how many would not?

Mr. Minsky Mr. Strang wants to make a comment, but before he does, let me say that I worked up some statistics on it in my brief. I am getting ahead of myself, but at the bottom of page 7 of the brief you will find the following:

"Similarly, the largest labourers' local union in Ontario, Local 183 in Toronto with a membership of approximately 9,000 (7,500 of whom work in construction and 1,500 of whom work in various industrial establishments) has made virtually no applications for certification for contractors who actually work in the ICI sector. Local 183 is very active in the residential, roads, sewers and watermains and heavy construction sectors of the construction industry with a very small number of the employees it represents engaged in ICI construction.

"Similarly, with respect to Local 793, only 1,800 of the approximately 8,000 employees represented by Local 793 are employed by contractors working in the ICI sector."

Mr. Gillies, outside those general parameters--and I suppose the pretty specific ones for the engineers--it would be hard to tell you at any one time how many members of any one union work in the ICI sector because members are crossing sectors and going from collective agreement A to collective agreement B, and sometimes even to C and D, in one day.

Suffice it to say that of the engineers who man this heavy construction equipment that you see out on a heavy engineering site or on a roads project, a small proportion, 1,800 out of 8,000, work steadily in connection with ICI construction. You will find that it varies with the union. There are other large civil unions, for example the carpenters, who also have a very large component outside the ICI sector. There are unions such as the boiler-makers' and asbestos workers' unions that cover very few sectors because of the industrial kind of thing they do. Things like earthmoving have to be done in every kind of project you can think of; covering a pipe does not. It would be hard to generalize with you. Suffice it to say a very substantial number of people in the construction industry never see work in the industrial, commercial and institutional sector.

Mr. Callahan: To change that, you would almost have to say something to the effect that we would allow the construction industry and other than those covered by sections 137 and 151 in our ICI--

Mr. Minsky: Or by accreditation orders.

Mr. Callahan: But they talked about accreditation as well as--

Mr. Minsky: Mr. Callahan, accreditation is still in the act. It has been there for 15 years. It is now irrelevant for the purpose of the ICI sector of the industry. For example, the board could still entertain an application for accreditation, as it is right now for sewer and watermain construction involving the operating engineers, and there are some outstanding accreditation orders that make Bill 65 irrelevant.

Mr. Callahan: All right. Is everything contained within section 117 given a special method for accreditation or designation under those sections?

Mr. Minsky: No. It really does not work like that. Section 117 is just a definition section.

Mr. Callahan: Why would they define them if they are not meant to fall within those provisions?

Mr. Minsky: This is one of the 1970 amendments. The definition of sector came into the act 15 or 16 years ago when accreditation was introduced. That is because an accreditation order had to be made in connection with a particular sector. Sector, to define a division of the construction industry, came into the act to assist the board in issuing and in defining an order of accreditation. For example, the board can issue an order for the sewer and watermain sector, etc.; what it cannot do since 1978 is issue an order in respect of the ICI sector as that is covered by designation legislation.

Mr. Callahan: Are you saying that if you are designated as opposed to being accredited, you should not fall within--

Mr. Minsky: Bill 65?

Mr. Callahan: Bill 65.

Mr. Minsky: No. I am saying if you are either you should not. If you are subject to a designation order or to an accreditation order, Bill 65 is immaterial because you do not bargain an agreement; you are automatically covered by the central agency's existing agreement.

I want you to understand, though, that designation covers only ICI--and accreditation should also be in your mind when you are considering this--but in fact while those provisions still exist in the act for accreditation, there are very few existing accreditation orders and so few as to still require the coverage of Bill 65 for the great bulk of bargaining that is not affected by accreditation.

Mr. Callahan: Why is that? Why are there so few?

Mr. Minsky: First, you have to know that this is an employer-type certification, and I act for unions. Let me explain it. The employer organization forms into what we call an employers' organization or a contractor association. They then have to organize the employers--not the union members or the workers, but the employers. They may come to the board, and if they can show to the board that they represent the majority of the persons represented by that union who represent in turn the majority of contractors--there is almost a double majority--who deal with the union in a particular area and sector, the board will accredit them.

My guess is that it is not very easy for an employers' organization to come to the board and to have enlisted that many contractors as members that it represents not only a majority of the unionized contractors within the area and sector in question but also, as contractors, that they have as employees the majority of the workers in that area and sector. It is difficult enough that there have not been a lot of orders. In fact, most of the orders I am familiar with that were issued between 1970 and 1978 were in the ICI sector and involved some of the main civil unions, but also plumbers, electricians, etc., in areas such as Toronto, Hamilton and Kitchener.

2:30 p.m.

Mr. Chairman: Mr. Callahan, before we get bogged down part of the way through the brief, can we get back to the brief?

Mr. Callahan: I do not know about the rest of you, but unless I understand this, the rest of it is gobbledegook.

Mr. Minsky: This is pretty salient to what I am trying to explain.

Mr. Callahan: I do not understand it, and if anybody else here does, then I applaud you; but I do not understand what they are saying. I do not know whether the rest of the members agree with me, but I think it is key to even addressing your mind to what is going on in this brief.

Mr. Chairman: I know it is difficult.

Mr. Taylor: That is why I interrupted. I appreciate the clarification that has been given.

Mr. Minsky: The way the Labour Relations Act is set up, the provisions dealing in part with accreditation and in part with designation take precedence over general sections of the act. One of the concerns you have, Mr. Callahan, is that if Bill 65 comes in, it ought not to disturb--and I am the first to say this--designation orders or collective agreements.

Mr. Callahan: Or discourage them.

Mr. Minsky: You cannot discourage designation; it is in and it is

all over the province. It is mandated. There is no discouraging of it. The Minister of Labour actually issued all the orders eight years ago, and the provincial agreements have to be in effect every two years. But I understand the word "discourage" in the sense of accreditation.

What I want to explain to you is that there are what they call conflict provisions of the Labour Relations Act which deal with this very kind of problem. If I can direct you, for example, to section 118 of the Labour Relations Act, it says, "Where there is conflict between any provision in sections 119 to 136 and any provisions in sections 5 to 57 and 62 to 116, the provisions in sections 119 to 136 prevail." If this section came in as 40a, one would assume the accreditation provisions and the automatic binding effect of the accredited association's collective agreement would prevail over section 40a, as you and I would expect and want it to do.

Similarly, in designation, if I can put my finger on it, section 138 of the act reads this way: "Where there is conflict between any provision in sections 139 to 151"--they are the designation provisions--"and any provision in sections 5 to 57 and 62 to 136, the provisions in sections 139 to 151 prevail."

Mr. Gillies: You just answered my question.

Mr. Minsky: I am glad of that. It seems to me that answers the question of possible conflict and disruption with designation and accreditation orders, which no one here wants. My clients have not come here for that purpose at all. To the contrary, my clients are satisfied with the provisions in the act, and the way they work, dealing with designation and accreditation.

I recognize these are fairly difficult concepts. The only way for me to explain designation easily is to tell you that it is a variation of accreditation. Designation is accreditation, but it is province-wide ICI accreditation. It is mandated by the act; it is not the choice of the parties, where accreditation is the choice of the parties.

Do not let the terms "accreditation" and "designation" throw you. Accreditation is simply the employer counterpart of certification. A union gets certified to represent a group of employees of an employer. An employer gets accredited to represent a group of employers who bargain with a union. You see these words thrown around the act. I deal with them every day, but I realize they are not the most common of words.

Mr. Callahan: Mr. Gillies has got it.

Mr. Gillies: I am sorry we are getting offtrack again, Mr. Chairman. If I skip to the back of your brief--and you just called for the deletion of subsection 40a(18)--my concern is, would it then be clear enough in the act that there is a nonapplication to the ICI sector? I am now convinced, having read sections 118 and 138 of the act, as you just pointed out, that it would be clear, because they clearly prevail.

Mr. Minsky: That is right. That is my understanding. That is why I did not feel I had to go any further. You have our position; if something more is required to make that clear, then by all means.

Mr. Callahan: Let us get back to the word "discourage." You would have no more accreditation orders, because they would prefer to deal under Bill 65.

Mr. Minsky: Again, accreditation should not be touched by Bill 65. Everyone agrees that we are not even attempting to touch accreditation, to discourage or encourage it; we are saying in so many words, by reference to the section I gave you a moment ago, that is outside of the scope of Bill 65 for purposes of first-contract arbitration. We accept that. We do not even want to touch that. We are not trying to discourage it.

Mr. Callahan: I do not want to belabour this point, but quite honestly I am still not sure of the purpose of the legislation in setting up accreditation and designation. It was obviously to create a pattern across--

Mr. Minsky: The purpose of the accreditation goes back to this. It was felt for years, and there have been a lot of learned treatises about it, that the employers could bargain better if they could bargain cohesively as a group and the union could not split off members of that group of contractors and try to get a better deal. There were words such as "whipsaw"--I am sure you may have heard that word--and "leapfrog"--that is another word we used to hear--to describe a situation where, for argument's sake, the union with the carpenters in Sarnia would get a great deal and not settle the agreement in Toronto. With the great deal in Sarnia, they would try to get a great deal in Toronto. That is the theory.

The example is just made up, of course, but the idea was that by accreditation, the employer would thereby be able to achieve more bargaining strength within a certain area and within a certain sector. Many contractor organizations were specifically formed for the purpose of getting accredited and then entered into these agreements across Ontario.

Mr. Callahan: If we take these people who are not ICI--

Mr. Minsky: For example, the residential sector.

Mr. Callahan: --and make Bill 65 applicable to them, what is to prevent a group in Brampton that is doing a residential community from doing the same thing as was attempted to be overcome by this legislation with, say, a residential thing going on in Sarnia? I am really speaking out of ignorance--

Mr. Minsky: No. Maybe what I have not explained is that the accreditation provisions are still in the act. If those contractors, to use your example, want to have an accreditation order that would require the union to deal only with that particular group of contractors through the association, they can apply tomorrow to the labour board and try to get accredited.

Mr. Gillies: Bill 65, if it applied even to part of the construction industry, could not interfere with that.

Mr. Minsky: It could not interfere with accreditation; exactly. It would always be subject to the prevailing accreditation or designation order. I cannot stress enough that we are not trying to touch that.

Mr. Taylor: After creating order out of chaos, now you are going to tell us what has fallen between the cracks.

Mr. Minsky: There is a whole lot of construction out there that needs the first-contract arbitration. As I am sure the other unions that have come here have told you--and maybe this is contrary to popular myth--unions do not like taking strikes. They do not like taking first-contract strikes in

particular, because some of those are the most bitter and the most irreconcilable. They come to this committee and say: "Look, Bill 65 means nothing to designation legislation. It means nothing to the accreditation orders. But there is a huge area of construction out there that has nothing to do with designation or accreditation. Help us too."

Mr. Callahan: Let me go back to it. Let us say the government did that. You would have concurrent applications. You would have all the procedures kicking in under Bill 65, and at the same time you could have an employer seeking accreditation before the board. There would be just monumental delays.

Mr. Minsky: It has to be an employers' organization that seeks accreditation.

Mr. Callahan: All right. An employers' organization is seeking accreditation.

Mr. Minsky: Until the employers' organization achieves an accreditation order by the board, why should the union--for example, in the sewer and watermain sector, in the road sector or whatever else--not be able to go to the board and say, "Order first-contract arbitration"? Maybe it will never get the order. You can only deal with it once the order is out in the accreditation. I would have no trouble agreeing with you that no one should be going to the board to get first-contract arbitration; but until the order comes out, it is open ball.

2:40 p.m.

Mr. Callahan: Can you equally apply to have accreditation or designation removed? Is there a procedure in the act for dedesignation or deaccreditation?

Mr. Minsky: Decertifying? I would have to go through it with you to be sure of this, but I think there is a procedure for going back to the board or the ministry, as the case may be, and substituting bargaining agencies. Without giving you the detail on it, I think there is a process of removal, but the removal is not to nothing. I do not know that it has ever happened.

It does not mean, by the way, true decertification. For example, in ICI there is always going to be an employer bargaining agency and a union bargaining agency. You cannot get rid of them. The act mandates that they must be there. In accreditation, technically, you could terminate them.

Mr. Callahan: What would prevent those groups under accreditation from going back and doing that, to put themselves under the provisions of Bill 65?

Mr. Strang: They would not be; it is not a first contract.

Mr. Minsky: I would not think they would.

Mr. Strang: Accreditation does not deal with a first-contract situation; it deals with a situation where you have a largely unionized industry. It is there for the purpose of stopping whipsawing or stopping a union. Accreditation is a management section, if you will.

Say you have a section of the industry where most of the pipefitters--

the plumbers--were organized. Without accreditation, the fitters could strike half the industry and pull the fitters off the other half. If you did that at the height of the construction season, for those people who had been struck it would mean they would lose the season--bankruptcy--and it would mean the union could put all its people to work for the other contractors, who would simply take the work that the other people had to refuse.

You are not talking about a first-contract situation; you are talking about a very mature bargaining situation. With Bill 65, you only have it once, and once you have your first contract, then you are into--

Mr. Gillies: There is no problem there. A bargaining unit and an employer could have arrived at their first contract through Bill 65, and if there were an accreditation procedure later, there would be no problem.

Mr. Minsky: It automatically gets covered by it.

Mr. Gillies: Sure.

Mr. Minsky: That is the way it would work. We just do not see any real conflict with our position and accreditation and designation because in effect we are willing to play second fiddle to those legislative provisions and we believe they should predominate.

The reality of the situation is that a lot of bargaining is not going to be affected by any accreditation order ever made. If you look at the history of the accreditation orders, we have had those provisions in the act for 15 or 16 years, but outside of the ICI sector, there have been a handful of accreditation orders issued.

The only reason I mention accreditation along with designation is that I want the committee to see the whole picture and to understand that where there is an accreditation order, just as where the designation orders are made, Bill 65 ought not to enter.

Mr. Callahan: You should go on, Mr. Chairman. I am obviously going to have to read these and catch up. However, there is something there that just does not meet the eye. It defines "sector," which includes those items that you are saying are outside of ICI, and then goes on immediately thereafter to say that where there is a conflict between any of the provisions in sections 119 to 136 and so on, sections 119 to 136 prevail. The very fact that they put the word "sector" in there would seem to me to mean they are being carved out of the normal process of certification, collective bargaining and so on and put in that section. What you are asking us to do is to take them out of that and put them into the normal--well, you go on. As I say--

Mr. Minsky: I think you are just giving a different meaning from what the act or, so far as I know, the Ontario Labour Relations Board gives to the meaning and intent of clause 117(e). These sectors are just divisions of the construction industry. It is just a way to pinpoint various parts of the industry, recognizing it is not a homogeneous whole.

It got introduced into the act in 1970 with the amendments for accreditation because under section 125 of the act dealing with accreditation, the accreditation order must be for all employers in a particular sector of the industry and in the geographic area described in these certificates, etc. It recognizes that the employer association could apply to be accredited, for

example, in the roads sector, the industrial, commercial and institutional sector or the sewer and watermain sector. It should not have to apply to be accredited in the whole industry.

Bargaining in the construction industry tends to be by sector. The collective agreements in the sewer and water sector are not the same as those generally in the electrical power sector, the pipeline sector or the residential sector. In using the word "sector," the legislative draftsmen probably had that in mind. The different kind of work and end product defined by "sector" has also given rise to different collective bargaining. As far as I know, the industry has not had a great deal of difficulty dealing with the concept of sector at all.

Mr. Callahan: Okay, Mr. Chairman, I will do a little homework while you are doing that.

Mr. Minsky: If I can continue, the thrust of our submission, at the bottom of page 5 of the brief and on, is that unions and their members in the construction industry require the benefits of Bill 65 to an even greater extent than unions and their members employed in the rest of the economy. The main reason we say this is the character of the construction industry. There is a lack of permanence in the employer-employee relationship, which often lasts only as long as the particular project itself, and an ease of entry into and egress out of the industry. For example, there is not the tremendous office and sales staff nor often even equipment and supplies.

A union acquiring bargaining rights has to go about the business of getting a collective agreement bargain, but then the project is over before the agreement is negotiated and the bargaining rights achieved become illusory. Unions in the construction industry believe it is not unusual for companies to engage in tactics to delay reaching a collective agreement until the project is over. Thus, the union does not get a collective agreement, the project is over, the employees disband and nothing was done to assist them.

In the next part of the brief, we talk about certification activity in the construction industry. I think you may find this of interest to your deliberations. At the bottom of page 6, we took the most recent annual report of the Ontario Labour Relations Board from April 1, 1984, to March 31, 1985, showing 1,148 applications for certification received by the board, of which 252, or 21.9 per cent, were with respect to the construction industry. By the way, that figure is down. In 1982-83 and 1983-84, the construction industry applications accounted for 30.2 per cent and 29.2 per cent respectively of all applications for certification received by the board.

Why did we give you those statistics? We want you to know that of the total certification work load of the board, a little less than one third is coming out of the construction industry. It is not a one per cent interest that brings us here today; it is a 30 per cent interest.

We went on to point out that for various locals of labourers as well as Local 793, the labourers accounted for 96 of these applications, 38 by the engineers of Local 793, and the vast bulk of these applications for certification included employees working in sectors other than the ICI sector. The majority were not in ICI at all but were in non-ICI sectors of the industry.

We cite the case of Local 1059 of London, in the middle of page 7 of the brief, which made 35 applications for certification to the labour board over the past 30 months. Of those 35 applications, only six were with respect to employers actually operating in the ICI sector.

At the bottom of page 7 and the top of page 8, we recount the statistics involving Local 183 and Local 793 as to the small number of employees they represent who are actively engaged in the ICI sector of the construction industry.

2:50 p.m.

Based on statistics compiled by the labour board and our own in-house research, we ended up with the thesis that unions and their members in the construction industry are in much the same position as unions and members in other sectors of the economy. Once bargaining rights are obtained, the process of negotiation leading to a collective agreement must begin, a process that is subject to the same problems and difficulties experienced in the rest of the economy that spawned Bill 65. Simply put, in the vast majority of the construction industry, other than ICI-designation legislation or accreditation orders, there is no cogent industrial relations reason to exclude construction industry from the ambit of Bill 65.

Do the members have any questions other than those I have already answered so far? I am going to go into a bit of a legalistic issue in a moment involving the Charter of Rights and Freedoms.

Mr. Taylor: I am puzzled how this slipped through the net.

Mr. Chairman: I am going to ask Michael Failes, the policy analyst for the Ministry of Labour, to give us his views of why this exclusion is there.

Mr. Failes: One reason it was excluded was the ICI sector in province-wide bargaining. There was also a feeling that some unique characteristics of bargaining in the construction industry merited its being excluded--for example, the premise of pattern bargaining and the wide-spread occurrence of voluntary recognition. It seemed to create a different labour relations atmosphere. Some unions have expressed some concern that employers might find this to be more of a useful tool.

I am interested in your comments on those two aspects. As well, I would like to know of any bitter first-contract strikes which have occurred in the non-ICI sector, strikes where employees have been out for a length of time and unable to get an effective agreement.

Mr. Minsky: I have not researched that specifically. I have no doubt there are many examples of it across Ontario, but I did not go about looking for it just that way.

Mr. Failes: I mention that because one of the reasons for this legislation is to avoid those kinds of bitter contract disputes.

Mr. Minsky: That is what brings us here, because there is a natural reluctance to take people out on strike. There is a natural reluctance to go out on a first-contract strike. It is a very bitter situation and a very terrible situation for those parts of the economy that get impacted so quickly by construction. Responsible unions try to avoid it.

If there had been very few of the strikes that you asked me about, the irony would whether you ought to penalize the unions in coming here now or to compliment them. In effect, the fewer there have been would tell me the more mature and responsible unions have been in not taking those strikes. Unions do not get contracts all the time. These go to a no-board, and in 16 days the employer can lock out or the union can strike. Often all that happens is that bargaining rights are lost because the union never gets a contract, and/or it takes a strike and/or sometimes a contract is finally entered into. It is a tragedy.

Mr. Ramsay: What is pattern bargaining?

Mr. Failes: I was hoping that the delegation would expand on that.

Mr. Minsky: Let me comment on pattern bargaining. Someone asked me a moment ago why accreditation came in and what its advantages were. One of the advantages for both the industry and the unions of accreditation and of designation is that it spawns the standard contract.

For example, years before designation legislation, the engineers in Toronto had a standard contract which they negotiated with the senior or prime employer group. For example, in the ICI sector, it was the Toronto Construction Association. Those main parties sat down and came up with an agreement. The members of the union and the contractor members of the TCA were bound by that contract. It became the standard contract, even before accreditation, because if the union organized another company which was not a member of the TCA, it would go to the other company and say, "This is the contract we have with the TCA. You do not get better rates. You do not get worse rates. You get those rates."

Mr. Failes: Okay.

Mr. Taylor: How much better can it get? Is this a utopian contract?

Mr. Minsky: That is how it works. That is pattern bargaining in the construction industry. It works from the union's point of view and the employer's point of view. It takes away the opportunity of certain employer groups trying to get a cut rate and thereby get work based on paying less to unions. They do not pay less; they pay the same for unions coming up with those kinds of tricks. This is not Ontario I am talking about; I am talking about North America. This is the way construction industry labour relations have worked for decades.

Mr. Taylor: We are talking about the logic of leaving this out.

Mr. Minsky: I cannot explain the logic to you; I am only trying to explain what pattern bargaining is.

Mr. Gillies: I have yet to hear a good, solid reason why these workers should not be included under the bill. With respect to what Mr. Failes said, as far as I am concerned, good law does not arise out of designing a bill to address a couple of specific problems. Because there have not been lengthy first-contract disputes in the construction industry, to me is not an argument for these workers not having the same right under Bill 65 as the other workers.

Mr. Minsky: Let me add this. I explained what pattern or standard bargaining was in the construction industry. I hope you understand, and it goes without saying, that not every employer would sign the contract. Often, the union is under pressure from everyone in the industry--its members and the other companies with which it bargains--not to come up with cute little deals here and there. It holds its ground and the employer says: "You know what? If you do not want to give me a cut rate, no deal. If you do not like it, go on out."

Mr. Chairman: May I suggest that Mr. Failes asked only two questions and also asked for an explanation of pattern bargaining. You have not yet got into the reasons for the exclusion. Perhaps we could give him that opportunity now.

Mr. Failes: Would you agree that there is widespread pattern bargaining going on today in Ontario?

Mr. Minsky: It is enshrined in accreditation and designation. The legislation elevates the standard contract almost to a statutory contract. For any of us who do not have accreditation or designation, it is a union walking into the employer's office and saying: "Look, here is our area contract. Will you please sign it?" An employer sometimes says, "No, I will not." There you go; there is an impasse.

Mr. Pierce: You are talking about North American bargaining as opposed to just Ontario bargaining.

Mr. Minsky: What I am talking about takes place across North America. For example, there are different legislative frameworks in Quebec with a decree system. Presumably, what I am talking about does not happen very often there. However, it happens in California, Texas, Manitoba and British Columbia.

Mr. Chairman: Now we are going to get the explanation.

Mr. Failes: Given that this pattern bargaining is going on, I think the rationale would be that to introduce first-contract arbitration would upset the balance which has developed in Ontario whereby most disputes, if you want to call it that, over first contracts are resolved simply by reference to the standard contract. By not introducing first-contract legislation in that area, you do not have a situation develop whereby a union which decides the standard contract in the area is not good enough for it will say, "We are going to go for something higher and, if necessary, we will take it to arbitration." This is an example.

Mr. Minsky: With the greatest of respect, that is not a good example at all because that does not happen.

Mr. Chairman: Nevertheless, it is an example.

Mr. Minsky: I am sorry. I act for many construction unions and I really cannot picture their trying to get more than the standard agreement. It is not acceptable conduct.

Mr. Gillies: In theory, why should an employer not be able to say: "I do not want to go under that standard contract. We will put it to Bill 65"? Why not?

Mr. Taylor: I think Mr. Failes is saying the first contract would be too rich.

Mr. Callahan: The standard contract would become the--

Mr. Gillies: You could make the same argument for a hardware store or a small manufacturer. I am looking at broad principles and I have yet to hear why these people should not be covered under the same law.

Mr. Failes: If I could go back to one--

Interjections.

Mr. Chairman: I have been abusing Mr. Failes, so we should at least let him finish.

3 p.m.

Mr. Failes: If I can bring it all back to this balance which has developed in the construction industry, the point which should be emphasized is that there is this absence of first-contract strikes, such as you find in other areas of the economy, in the construction industry. For instance, most other unions that have come here have started off with an example of a bitter first-contract strike or some dispute in which they have been involved. This is why they need the legislation. This is the first time this has been brought before this committee by any group. A lot of other unions which are involved have accepted, apparently at least, their exclusion from the general sector.

Mr. Minsky: They may not organize as much as these two unions do in sectors other than the industrial, commercial and institutional. That is a point I tried to make to you earlier. There are construction trade unions which are so centred in the ICI sector that they have no interest in any other sector, or some that cross only into one or another sector. We are looking at two unions here, and there are others as well, which cross all the sectors and do so with huge numbers of members.

Mr. Pierce: What about the teamsters?

Mr. Minsky: They cross into a number of sectors. They do not organize perhaps all of construction, but they do organize in many of the sectors. They may have a similar interest.

Mr. Pierce: I see them cross into even more of the sectors.

Mr. Minsky: It cannot be more because the operating engineers and the labourers' union cover them all; there are not more to cover. I see your point. The teamsters and perhaps the United Brotherhood of Carpenters and Joiners of America would be examples of unions that cover all or virtually all of the sectors. I can think of some unions that cover very few.

Mr. Chairman: Would it be helpful to the committee, because we do have another group to appear, scheduled for three o'clock, if we asked the Ministry of Labour to prepare something for us on this particular problem by the time we get to clause-by-clause debate? The committee is struggling with it and is not familiar with all the ins and outs and the complexities of the construction industry. I would appreciate it.

Mr. Mackenzie: It relates to what we have just been discussing. It is part of the answer we may get. I am aware of the organizing that the engineers and the labourers do in other fields. I believe you are right. The carpenters also cross into a number of fields.

Mr. Minsky: We think so.

Mr. Mackenzie: It seems to me that there are some at least that the International Brotherhood of Electrical Workers is involved in as well as the teamsters. My conversations with some of the provincial building tradespeople have not given me any urgency in terms of the inclusion. I can understand some of the specific unions. Have you any idea whether you are really looking for the elimination of the construction category? Are we looking at only some of the construction unions that may want to be included? I am not sure if you can give it off that way.

Mr. Minsky: I cannot speak for more than these two clients.

Mr. Mackenzie: I have talked to a number of them; that is the only reason I am asking.

Mr. Minsky: I cannot say whether the other unions favour or do not favour inclusion. It would be hard for me to understand why a union would not want the benefit of Bill 65 where it possibly could cover.

Mr. Mackenzie: Except that there would be more incentive where you are organizing in other fields.

Mr. Minsky: It goes without saying that the more you are outside the ICI sector and in the other sectors, the more you really need the protection. To use some of the examples you were using, there are unions that go outside of the ICI sector. One would assume that they would benefit from this legislation. They do not have to use it.

Mr. Mackenzie: Why are we not also getting it, apart from the presentation that we have here--and I can see the validity of exactly what you are arguing--on a much broader scope from the construction trades?

Mr. Minsky: I cannot answer that exactly.

Mr. Gillies: I wonder whether the committee could have our research people contact, if not all the other unions that organize in this area, then at least a good sample of them, to get some sort of response from them as to how they feel about this. On the basis of my discussions with these unions and on the basis of this brief, I think their case is a good one, but it would be wise for us to check with a couple of the others.

Mr. Chairman: Yes. I am not happy that our legal counsel is not with us today. That would be very helpful.

Mr. Callahan: Your final point is a constitutional one. I read it and I understand that part of the deal. If we did this, if you are right and that were to be included in the bill, would the counterargument not be available to the industrial, commercial and institutional sectors that they were being excluded from the provisions of Bill 65?

Mr. Minsky: I do not think so. I think you will find that under section 1 of the Charter of Rights there are defences even to a technical

infringement of the charter. The defence is that there is a special history and a special need for special legislation, for example, through accreditation and designation legislation. You can answer the charge of permitting those provisions dealing with accreditation or designation to prevail over this, even if there was a possible infringement, through section 1.

What I cannot understand is how you answer my charge, namely, if you take away accreditation and designation, you have the whole mass of the construction industry left and somehow you are saying no to their right. The committee has tried, obviously, to assist in the discussion of that, but I cannot think of any reason for your saying to the rest of the industrial construction community that is not covered by designation or accreditation, "You cannot come for first-contract arbitration." I just do not understand that. To me it is a straight infringement of section 15, because you are treating workers in Ontario differently for no apparent reason.

Mr. Callahan: How do the people out of industrial, commercial and institutional at the moment--

Mr. Minsky: How are they different?

Mr. Callahan: No. How do they get certified?

Mr. Minsky: In the normal way. What happens is that the union applies to be certified or signs a voluntary agreement. In either case, the legislation, sections 145 and 146 of the act, requires that the provincial agreement in effect every two years automatically binds. It is the same concept as accreditation.

Mr. Callahan: What I am getting at is that the people you are addressing that we should look after outside of ICI are dealt with in a special section of the act. What section is it?

Mr. Minsky: Sections 137 to 151 are designation, but the way you are putting the question it sounds as though you do not want to talk about ICI for a moment and you do not want to talk about accreditation. Now you are dealing with the contractors, the unions and the workers who are outside, different to ICI, or where there is an accreditation order.

Mr. Callahan: How do they organize?

Mr. Minsky: They organize in the same way and they get certified in the same way.

Mr. Callahan: Under what sections of the act?

Mr. Minsky: It is really section 5, the timeliness of the application.

Mr. Callahan: They go through the normal process and are not required to proceed within the special sections 137 to 151?

Mr. Minsky: No. That is the province-wide ICI section. By definition your question is, what do you do outside of ICI?

Mr. Callahan: Why are they referred to that? That is the question I asked. Why are they referred to in the definition as sector?

Mr. Minisky: Sector is just a division of the construction industry and it is just a matter of pigeon-holing people.

Mr. Callahan: But legislatures do not enact legislation for no purpose, as you know. There is a purpose obviously--

Mr. Minsky: For having sector?

Mr. Callahan: For instance, in many statutes you will find that different groups are dealt with in different sections of the statute and they are there for a very good policy reason. That is why I would like an answer as to why they are defined immediately adjacent to section 137--or is it 136 that defines them?

Mr. Minsky: Section 137 is the beginning of--

Mr. Callahan: Section 117.

Mr. Minsky: Clause 117(e) defines "sector."

Mr. Callahan: It has "construction industry," and then this section and sections 118 to 136 define certain people. It says sector and it specifically includes those sectors you have just referred to. What I read from that is, if you want to organize, that is the route you go.

3:10 p.m.

Mr. Minsky: Clause 117(e) is simply the definition of the word "sector." It does not authorize or give any rights and has nothing to do with anything. Let me go over it once more. When they introduced the concept of employer accreditation in the act in 1970, they introduced under what is now section 125 of the act the concept of "sector." That is the genesis of the word. Having introduced the word "sector" for purposes of accreditation, they then had to define it. Clause 117(e) is simply a definition section saying that "sector" means one of these divisions of the construction industry defined by work characteristics, namely, one of these seven or eight--industrial, commercial and institutional, residential, pipeline and so forth.

That is the background to the word "sector." The word "sector" picked up steam all over again in 1978 because the Labour Relations Act carved out a new regime for ICI sector provincial bargaining. As a matter of fact, there is a section in the act that if there is a dispute as to what falls or does not fall within the ICI sector, one can make an application to the Ontario Labour Relations Board for determination. That is section 150. It deals with an ICI sector determination. The phraseology and the genesis of "sector" are essentially neutral. It is simply a way to describe a part of the industry. That is all it is.

Mr. Pierce: Once you certify in the ICI sector, you automatically come under the umbrella agreement and there is no process of negotiations.

Mr. Minsky: That is right.

Mr. Pierce: That is the accepted way.

Mr. Minsky: That is the exact way it works if there is an accreditation order.

Mr. Callahan: It means they have access to either route; they can either come under the umbrella or they can go back and do it.

Mr. Minsky: Oh, no, not under designation or accreditation. Once that is there, it is in place and is law. It automatically covers. Why we do not need Bill 65 for accreditation or designation is that there is no bargaining. The bargaining is between central employer/employee agencies. Once the agreement is negotiated, everyone else is stuck with it.

Mr. Chairman: We are going to have to grind this down to a halt, but may I ask you one question? Are you at all concerned about employers using first-contract legislation, if this applied to them, where pattern bargaining exists, to break the benefits of pattern bargaining for unions?

Mr. Minsky: We have discussed that. We feel the case is strong enough where there is a proper standard agreement negotiated that we--and this is the chance we take--can prevail upon the arbitrator or the labour board, whoever is doing the arbitration, to set that standard agreement as the applicable first contract. That is the risk we take in coming here because, quite rightly, it is not just for us to go to the labour board and say, "Direct this contract to arbitration." The employers can too. We have enough, if you will, confidence in that prevalence of the standard agreement, the pattern-bargaining configuration and the good sense of these tribunals that where we have a proper standard agreement, and we can prove it, that is the one that will get set.

Subsection 40a(15), as drafted, states: "In arbitrating the settlement of a first collective agreement under this section, matters agreed to by the parties, in writing, shall be accepted without amendment and account may be taken of,...(b) the terms and conditions of employment, if any, negotiated through collective bargaining for employees performing the same or similar functions in the same or similar circumstances as the employees in the bargaining unit."

That is the entrée for us to go before an arbitration board and say: "We have 200 companies under contract. They all have this contract. They have all had that standard contract for 20 years or 50 years as negotiated from time to time." That accreditation and designation are a legislative recognition of the standard contract. That is really what that is.

Mr. Failes: I have one clarification. Probably the main reason for not including it is the fear of people using it. Are you afraid that employers, rather than signing a collective agreement, as they would have before to avoid a strike, because they cannot afford it beyond a short time frame, will instead say: "Let us avoid this pattern agreement. Instead, we will apply for arbitration. There cannot be any strike and we will drag the union through the dirt. We will take them to arbitration. It will cost them a lot of money"? Is that not a concern?

Mr. Minsky: That is not a concern. We want to get a contract, but there are these situations. You are giving us a good example of an employer who probably is not going to sign anyway. We have to go to arbitration and we have to try our best to convince the tribunal that there is a standard agreement and that is the one that ought to be imposed. That is the kind of confidence we have to have to present successfully that case.

Mr. Chairman: When we get to the clause-by-clause section, we are going to have the Ministry of Labour give us a presentation and we will have our legal counsel, who is not with us today, do some kind of sampling to determine other views as well. It is conceivable we will be back to you if there are some unanswered questions on that.

Mr. Minsky: I appreciate that.

Mr. Chairman: Do you want to complete the rest of your brief? You can leave it with us.

Mr. Minsky: I can leave it with you. I adverted to the balance very briefly and I am happy enough to leave it with you. It is the reference to subsection 15(1) of the Canadian Charter of Rights and Freedoms. By precluding the balance of the construction industry from Bill 65, our concern is that Bill 65, as drafted, infringes on the equality of rights section of the constitution and cannot possibly, as even this afternoon we believe is turning out to be the case, be justified under section 1 of the charter. There is not the rationale that is self-evident to us or to people we have talked to to say, "No, you cannot have it." Therefore, that is the main second reason why we are saying we ought not to be excluded from coverage.

Mr. Chairman: Mr. Pierce, you had a question.

Mr. Pierce: Just one small one. I am a little bit confused because the International Union of Operating Engineers and the Labourers' International Union of North America are the first ones that have come to us and said that the construction trades should have access to the bill, as far as I know, and I have missed some of the hearings. What I am wondering is if there has been any co-operation or discussion between the construction trade unions on this particular bill. If there has been--and I know you cannot speak for the other unions--do they not see it as being a necessary part of their process to acquiring first contracts? Is there anyone who is having any trouble with the operating engineers and the labourers' union?

Mr. Minsky: There has obviously been discussion in different union halls and so forth. I am not in a position at all to say conclusively anything about the views of the other unions. Suffice it to say that these two unions feel very strongly about it and they are large unions. They get into these other sectors in a way that some of the other unions really do not.

Mr. Pierce: The teamsters and IBEW, for example.

Mr. Minsky: I cannot speak for the other unions. Mr. Mackenzie mentioned the provincial building and construction trades council and, frankly, I am not aware of what their view is. I am not aware that they have an official view one way or the other, pro or con. There is another group in Toronto called the Toronto-Central Ontario Building and Construction Trades Council, which is an umbrella group in this area. I am not aware of what their views are.

There is not a lot of time between getting notice of these sessions and getting into position to come here. With more time, perhaps the people I represent would have done a wider canvass. To be very frank with you, there was not a lot of time and we were only retained on this a couple of weeks ago and we have taken that amount of time to get here today.

Mr. Taylor: You were not aware of any prior consultation between the minister or the ministry and organized labour then.

Mr. Minsky: Absolutely not. I am not aware of it.

Mr. Taylor: Mike, did you not discuss this with them?

Mr. Failes: I do not know what was done with respect to this.

Mr. Minsky: Are you saying construction trades? I do not know of any with construction trade unionism. For example, the minister may or may not have had discussions with the Ontario Federation of Labour. I do not know if he did or he did not by the way. But whether he did or he did not, I do not have any understanding that he did with the construction unions.

Mr. Taylor: I would have thought there had been an approach, and there might have been, surely on something as fundamental as a section of the legislation which specifically eliminates a sector.

Mr. Minsky: I have no idea of that. I cannot answer that.

Mr. Chairman: You raise an interesting point, Mr. Taylor. Mr. Minsky, thank you very much.

Mr. Minsky: Thank you for having us, sir.

3:20 p.m.

Mr. Chairman: You have obviously raised some interesting points and you may even have let the fox loose among the chickens, but that is just fine; that is what we are here to deal with. We appreciate your coming before the committee.

The next group is the Ontario Teachers' Federation. We apologize for the delay, but that was a contentious presentation. As you might have seen, the committee was having difficulty wrestling with it.

Mr. Matte: We also enjoyed listening to them.

Mr. Chairman: Good.

Mr. Callahan: It was not very good.

Mr. Taylor: You have your own definition of that.

Mr. Chairman: There is a rule around here that we ignore interjections. If you would introduce your delegation and proceed, we would appreciate it.

ONTARIO TEACHERS' FEDERATION

Mr. Matte: To my right is the secretary-treasurer of the Ontario Teachers' Federation, Margaret Wilson, and on my left is James Carey, an executive assistant for the federation. My name is Guy Matte and I am the president of the federation.

Mr. Chairman: Excuse me. A brief was handed out this morning. It is this one. There has been an additional page distributed just now. I am sorry. That was not an interjection.

Mr. Matte: Thank you very much for receiving us this afternoon. The federation represents 105,000 teachers in this province, who are employed in both the elementary and secondary public school system in this province. We have been incorporated since 1944 under the Teaching Profession Act. The members of OTF are represented for collective bargaining under the School Boards and Teachers Collective Negotiations Act, 1980, which we usually refer to as Bill 100.

We believe very strongly in our responsibility to attempt to gain full collective bargaining rights for all workers who seek such rights. OTF wishes to present its position before this committee to share our solidarity and our support for the rights and needs of all the workers.

As you know, you have received two affiliates of the federation already. I believe some of our affiliates are recognized as trade unions by the Ontario Labour Relations Board under the provisions of the Ontario Labour Relations Act.

A problem about which you have heard before and which we would like to put in a global perspective this afternoon is that not all teachers in this province are covered by Bill 100, the School Boards and Teachers Collective Negotiations Act. Occasional teachers, who are currently defined, as you will see on page 2, as those who are replacing or substituting for teachers who are permanent, probationary or temporary teachers who are not present to do their job, it seems are not covered at this time by Bill 100. They have no choice but to attempt to be certified under the Labour Relations Act. That is splitting qualified teachers into two classes for the purpose of collective bargaining. We find that unfair and unsatisfactory.

The federation has maintained that the definition of teacher should be amended to include occasional teachers, night and summer school teachers, and teachers who work in adult day schools who are employed to teach a course or courses for credit. The adult teachers who work in adult-based schools would be part of this definition of teachers.

The Ontario Labour Relations Board has found in favour of the federation's position that continuing education teachers should be under the parameters of Bill 100. The federation strongly supports these rulings but has much cause for concern, since the affiliates of the federation have experienced great frustrations and difficulties because of unnecessary delays and inaction on the part of the OLRB in processing such applications made by the affiliates. For these reasons, we believe some provision should be included in the School Boards and Teachers Collective Negotiations Act which would provide for first-contract legislation.

We believe it is totally inappropriate that teachers, for collective bargaining purposes, are currently being forced to be represented under two distinct and separate acts. The federation's position is that all teachers certified to teach in the elementary and secondary publicly supported schools of the province be covered under the terms and conditions of the School Boards and Teachers Collective Negotiations Act. The current uncertainties affecting various groups of teachers deny occasional teachers the right to bargain collectively, creating harmonious relations between school boards and teachers.

It is our recommendation that all teachers be included in Bill 100. Of course, it does require some guts from the government of Ontario to do something to change the act, which up till now the previous government had not had and this present government has not indicated it will go to. Therefore, we are looking forward to this first-contract legislation helping us do some bargaining for those who are not covered under Bill 100.

The Ontario Teachers' Federation supports this collective bargaining legislation which is designed to provide for full and fair collective bargaining rights. Should there be no changes to the School Boards and Teachers Collective Negotiations Act, the federation strongly recommends that the staff of the labour relations board be increased.

The federation also believes the basic purpose of first-agreement arbitration is to deal with those situations where an employer continues to refuse to deal with a trade union even after it has acquired bargaining rights.

The federation requests that the standing committee on resources development ensure the provisions of Bill 65 apply equally to the School Boards and Teachers Collective Negotiations Act. Clause 2(f) of the Labour Relations Act exempts the act from applying to teachers who are not covered under the School Boards and Teachers Collective Negotiations Act. A reference should be made in the appropriate sections of the Labour Relations Act specifying that the exemption noted in clause 2(f) does not apply for the purposes of the sections dealing with the provisions of Bill 65.

The UTF commends the government for introducing this first-contract legislation and believes Bill 65 will assist in removing many of the present problems we are experiencing, especially in trying to certify new bargaining units.

The federation believes the proposed legislation should not be limited to a mechanism initiated only when negotiations have deteriorated or inordinate procrastination has created unnecessary delays and hardships.

We urge that the arbitration process be open and unrestricted and be commenced within 30 days of receiving a conciliator's no-board report. Further, we support the position of permitting either party to the collective bargaining process the right to apply for arbitration of a first collective agreement after the conciliation process has been completed.

On pages 6 and 7, you will see the four recommendations we are bringing forward to you to be directed to this government.

1. All teachers should be under Bill 100, the School Boards and Teachers Collective Negotiations Act.

2. If this is not done, the arbitration process referred to in Bill 65 should commence within 30 days of receiving a conciliator's no-board report.

3. Either the bargaining unit or the employer should be able to apply for arbitration of a first collective agreement after the conciliation process has been completed.

4. The exemption noted in clause 2(f) of the Labour Relations Act should not apply for the purposes of the sections dealing with the provisions of Bill

65 as they pertain to teachers who are not covered under the School Boards and Teachers Collective Negotiations Act.

Thank you for this opportunity.

Mr. Chairman: Thank you.

Mr. Matte: One of the problems we find in the different pieces of legislation under which we are governed is that a teacher is many things, not only in schools but also under the diverse acts. We have provided you with definitions of what a teacher is and all the different things from the Education Act, the School Boards and Teachers Collective Negotiations Act and the Teaching Profession Act. A lot of our problems and miseries lie in these definitions.

Mr. Chairman: Thank you. This committee needs all the help it can get.

Mr. Gillies: Just think, Mr. Matte: Your misery is rapidly becoming ours.

Mr. Matte: I like to share it around.

Mr. Gillies: I am not sure whether I should ask you or our counsel this, but they are not here. Do you know whether an amendment to clause 2(f) is all that is required to do what you want? From the research you have done, do you know whether there are other amendments needed in the act to enforce what it is you are after?

Mr. Matte: Do you mean in this one you are considering?

Mr. Gillies: Yes.

3:30 p.m.

Mr. Matte: There are two things. One is that our main objective is that all teachers should be covered under Bill 100.

Mr. Gillies: Yes, but before that, in the introduction and your first three recommendations--

Mr. Matte: Failing those and looking at this one, it would be very good if clause 2(f) were amended. Legal counsel could probably give you a better wording, but it should be something that says this act does not apply to a teacher covered by the School Boards and Teachers Collective Negotiations Act. That would go a long way to help, because it would make it very clear, if there is no change elsewhere, that if you are not covered by Bill 100 then you are under the Labour Relations Act. If you are not under that act, then you are under Bill 100.

We are finding now that teachers are falling between the cracks. Boards are taking both sides, saying: "They should be under Bill 100, so we do not want to consider it. We are going to challenge you." Every time you try to organize under the Labour Relations Act, it goes to the Supreme Court. Then you try to organize under Bill 100 and they say: "You cannot. They are not really teachers as defined there. Go and do it in another way." We are caught in between because the definition of a teacher is so diverse, depending on the different acts, that this is used to our disadvantage.

Mr. Gillies: Could I ask this--

Mr. Taylor: On a point of clarification, if you do not mind, Mr. Gillies. I do not understand the rationale of the previous government and this government for not including part-time teachers in Bill 100.

Mr. Callahan: It is cheaper.

Mr. Taylor: If there is a rationale, could you let me know what it is?

Mr. Matte: Yes. We have tried to have this changed. Why was it done? When we did it in 1975, we thought we had everybody under the act. When we came to apply it, we found out from management that these people were not included and we have been challenging it since then. We have tried to make it clearer by asking for amendments to the School Boards and Teachers Collective Negotiations Act, to get a proper clarification of what a teacher is so that it would include everybody.

The standard answer from the former Minister of Education and the former Minister of Labour of the previous government was that we had to get the agreement of the employer to change the definition. In other words, if you want to define who will be a member of the bargaining unit, you must have the agreement of the employer. That is the type of answer we have had for years. We are now trying to see whether we can effect changes with this present government, but it is close to a year now since last June and we have not finished discussing it. We have not received a "no" yet from this government.

Mr. Taylor: That might be a response, but it is hardly a rationale in my way of thinking.

Mrs. Wilson: I have been actively involved in these discussions with this government and the previous one since 1977. The consistent answer, both verbally and in writing, has been that there will not be a change until the employers agree.

If I can show you a couple of things on this page, I can clarify where the difficulty lies. It is a lesson in describing what a teacher is. A teacher is described in two ways under the acts: by qualifications and by the form of contract of employment. We are all familiar with what teachers' qualifications are. In the Education Act, you find a teacher is someone with a valid certificate of qualification. We are all used to that. Then you get classifications of teachers, and only two of those classifications have a form of contract under part IX of the Education Act. The form of contract is either permanent or probationary teacher, and that form of contract is individual and separate from the collective agreement. Temporary teachers do not have that form of contract nor do occasional teachers. Night schoolteachers, summer schoolteachers and adult day schoolteachers may or may not be in limbo depending on the Labour Relations Act, the school boards and the courts. All those things are going on right now.

When Bill 100 was written, we thought all teachers would be caught in the net cast by the bill. The paragraph following subclauses 1(m)(i), 1(m)(ii), 1(m)(iii) of the bill refers to "a teacher in the form of contract prescribed by the regulations under the Education Act...." This section missed long-term occasionals or casuals. Since night school, summer school and--sometimes but not always--adult day schoolteachers do not have permanent or probationary contracts--I say sometimes; it varies from board to board--they

slipped out too. We have been struggling to find representation for those people ever since.

A large number of these teachers end up being paid the regular salary of classroom teachers. Boards commonly put long-term occasional teachers on full scale after 20 days. They may or may not give them benefits. Sometimes they hire them for 20 days, lay them off for one day, hire an occasional for the one day and then hire them for 20 more days so they do not have to pay them on scale.

We find a large number of people out there without any representation at all. We are consistently told the employer in effect will control whom we represent because the government will not amend the act without the employer's permission.

Mr. Mackenzie: The employer is able to get away with paying you less and without benefits because you are a specialized and rather small group in terms of total numbers.

Mrs. Wilson: It is a growing group.

Mr. Mackenzie: It is growing now. However, it should have been covered years ago. There is no reason on earth it was not.

Mr. Gillies: We are fast coming to the time when the committee will want to consider amendments and go into the bill clause by clause. Perhaps you and your legal people could send us a proposed draft amendment. I would find that most helpful. In trying to do the right thing, we do not want to screw anything up.

I look at this in pretty broad strokes, but if the labour relations board recognizes these types of teachers as qualifying under the act for its purposes, then I believe the act should be changed to recognize that.

Mr. Chairman: It should be part of Bill 65.

Mr. Gillies: Yes. You appreciate we cannot change Bill 100 here.

Mr. Matte: We know that.

Mr. Gillies: However, we can change Bill 65.

Mr. Matte: You appreciate also that, even though some of our affiliates have been recognized as trade unions, we have organized teachers who have been recognized by the OLRB. Nevertheless, the board is bringing us to court for judicial review because it fails to recognize that these teachers should fall under the OLRB. Mind you, it does not want to recognize them under Bill 100, but it would like those people to fall between the cracks to make sure they have no right to representation. We find this highly unfair.

Mr. Gillies: It sounds like game-playing to me.

Mr. Mackenzie: It is damned clear that we should have changed Bill 100, but in the meantime we have to deal with it under Bill 65.

Mr. Matte: If you go some way to ensure very clearly that teachers are covered under one act or the other and that there is no grey zone, then at

least if we succeed in another forum in changing the definition in Bill 100, even if we miss some people, they could still be under the OLRB.

Mr. Callahan: You have answered my question. A group came before us a couple of days ago and told us there was a challenge because of the certification of part-time teachers under the Labour Relations Act. I was not sure if it was that or if somebody who had been a part-time teacher had been certified under Bill 100. However, it is the other.

Mrs. Wilson: Yes, it is the act.

Mr. Callahan: Has that challenge been launched in a class action against all the groups that have been certified?

Mrs. Wilson: No.

Mr. Matte: It is one bargaining unit. We have asked for certification of one unit that has been recognized by the OLRB. That particular adjudication has been challenged.

Mrs. Wilson: There is a second one as well.

Mr. Callahan: I wanted to raise that because Mr. Gillies's exuberance to change all this may well have to wait until that is resolved. I do not know; maybe not. Maybe the board will make the change beforehand.

Mr. Mackenzie may have hit the nail on the head as to why part-time teachers were not recognized under the previous government, but is there not an additional factor to that? I am just thinking out loud. I notice they exclude a number of people in essential services, such as police forces, fire departments and so on. I do not know whether this happens: If your people go out on strike, are the boards entitled to bring in part-time or supply teachers to teach the kids while you are out on strike?

Mr. Matte: Boards have tried. If you are asking whether it would be the same type of legislation, no, that is not why we were exempted. The exemption in clause 2(f) of the Labour Relations Act was put there because of the existence of another act which regulates the collective agreements between teachers and boards.

Mr. Callahan: When you say the boards do not bring them in, is that because a teacher would not cross a picket line?

3:40 p.m.

Mrs. Wilson: They cannot find enough of them to staff the school system. It is a practical problem more than anything else. Regardless of whether you are in a small county or in Metropolitan Toronto, the school population is a reflection of the population of the local area. If the school system is shut down, there are not enough supply teachers in the small boards or in the large ones.

Mr. Callahan: When you say boards do not bring them in, is that because of the question that a teacher would not cross a picket line?

Mrs. Wilson: They cannot find enough of them to staff the school system. That is a practical problem more than anything else. The school system is shut down. Regardless of whether or not you are in a small county or in

Metropolitan Toronto, the fact is that the school population is a reflection of the population of the local area. In the small boards you do not have enough supply teachers, and in the large boards you do not have enough supply teachers.

Mr. Callahan: How do the collective agreements of these groups of part-time employees who have been certified address the question of benefits and so on? Does it relate on a pro rata basis to the contracts that full-time teachers have?

Mr. Matte: I can speak to Toronto. I can give you other examples.

Mrs. Wilson: The only one I am particularly familiar with is the one that exists in the city of Toronto between occasional teachers and the Toronto Board of Education. What they have tried to negotiate is a prorating of benefits with the occasional teacher being able to make up the difference in premium, so there is continuity of benefits. The employer does not pay the same amount he pays for a full-time individual, but the individual employee--

Mr. Callahan: Can make it up.

Mrs. Wilson: --can make it up and get full benefits.

Mr. Matte: That is about the standard in the province where we have certified groups.

Mr. Callahan: I noticed that the definition of "teacher"--

Mr. Matte: Which one?

Mr. Callahan: I guess I can take my choice. Under the Education Act, it means "a person who holds a valid certificate of qualification." Then it goes on to say "or a letter of standing as a teacher."

Mrs. Wilson: What is a letter of standing?

Mr. Callahan: No. I gather that any teacher who is even an occasional teacher holds a valid certificate of qualification. Why do they not then come within the framework of Bill 100?

Mr. Matte: That is why we turned the page. If you turn the page--

Mrs. Wilson: It is a letter of contract.

Mr. Matte: --that is what Mrs. Wilson was referring to as subclause (i). Subclause (i) is the valid teaching certificate, but if you go down to the bottom, the last paragraph, "who is employed--

Mr. Callahan: I see, "for a period not exceeding."

Mr. Matte: "--under a contract...as prescribed by the regulations." That is a teacher who has a contract.

Mr. Callahan: In other words, that is where you are getting at where a board might hire a part-time teacher for 29 days and then--

Mr. Matte: They have been much more creative than that. In some boards the practice has been that, when somebody goes for a sabbatical leave

or a maternity leave for a full year, not to grant the person a full year but to give a year minus a day. They have to come back for one day at the end of the year, so they do not have to give a probationary contract for the year to the teacher who is coming in to teach the entire year minus a day.

Mr. Callahan: The teacher who came in under those circumstances would be a teacher within the School Boards and Teachers Collective Negotiations Act.

Mrs. Wilson: No.

Mr. Matte: No. The boards do not give them a contract. They give them a letter of contract or a letter of understanding or whatever. Boards have been very creative in trying to go around this.

Mrs. Wilson: Read the definition of occasional teacher and you will find catch 22 in that.

Mr. Callahan: I am looking at clause 1(m), which says, "'Teacher' means a person...who holds a valid certificate of qualification," which you say even the occasional teacher holds. Then it goes down to the qualification and says, "but does not include...a person--

Mr. Matte: You have to read the portion above that.

Mr. Callahan: --"employed to teach in a school for a period not exceeding one month." I see. "Who is employed by a board under a contract of employment as a teacher."

Mrs. Wilson: An occasional teacher replaces a permanent, probationary or temporary teacher who is either dead or absent from duty for a period that is less than the school year. If the teacher is away for a full school year, a probationary teacher has to be hired. If the teacher is away for a year less a day, i.e., turns up on the first day of school in September and then leaves, the board hires a so-called occasional teacher who works for the rest of the year at an occasional teacher's rate of pay.

Mr. Chairman: Not are only the school boards creative, but the drafter of the legislation was pretty creative too.

Mr. Callahan: I was going to say that the drafter of these acts must be pretty creative.

Mrs. Wilson: You might wonder about people who have to turn up in Ottawa for one day.

Mr. Mackenzie: These little catch 22s were never there in so many of those.

Mrs. Wilson: By the way, large school boards are doing that quite commonly, hiring people for a year less a day.

Mr. Matte: If you want an interesting quirk, when we went in front of the Ontario Labour Relations Board to certify occasional teachers--those who are there for a year minus a day or extended letters of contract--the Ontario Labour Relations Board refused to certify them, saying they fall under Bill 100.

Mr. Callahan: Is that wherein the challenge lies?

Mr. Matte: Yes. It depends. We have many challenges. One of the challenges is that.

Mr. Callahan: It also says, "An employee includes a dependent contractor."

Mr. Taylor: What about that section on equal pay for work of equal value?

Mr. Chairman: You are only a little bit out of order. Are there any other questions or comments to the Ontario Teachers' Federation?

Mr. Mackenzie: Before we leave this, has there been any indication at all--maybe, Margaret, you could answer this--in the most recent talks you have had that there is any serious look at the changes to Bill 100?

Mrs. Wilson: I find it very frustrating. I am the person who gets sent to the meetings to do the detailed work. It tends to be a circular argument. Now we are getting, "Let us wait and hear what the courts say about the Humewood case" or about this case or that case.

Humewood Community School, by the way, is an unusual one. The teachers are fully employed. They are not occasionals, but they are teaching in a program that exists to service young females with problems. It is a residential facility, and the board is claiming that although the board is paying them, and they are being paid to teach a school program, they are not teachers. We should get an answer from the courts on Humewood fairly soon.

Mr. Matte: The answer to the question is that--

Mrs. Wilson: A lot of talk; no action.

Mr. Matte: --we are still trying because that is where we think--

Mr. Mackenzie: It is the fundamental answer to the problem. There is just no question.

Mr. Matte: Some of the cases have been backdated now from 1977. Talk about a need for first-contract legislation--this is to impose a first contract for teachers who are working right now.

Mrs. Wilson: Humewood started as a grievance in 1977. The courts may deliver an answer this May.

Mr. Matte: Which could be appealed.

Mr. Chairman: If there are no other comments, thank you for appearing before the committee. We appreciate hearing your views.

Mr. Matte: Thank you very much. We have taken note of the request you have put to us about the proposed drafting of an amendment to clause 2(f). We will look into that and come back to you.

Mr. Chairman: Thanks very much.

The next group to appear before the committee is the Ontario Public School Trustees' Association. With us we have Mr. Jakub and Ms. Morrow. We welcome you before the committee, and we look forward to your views.

ONTARIO PUBLIC SCHOOL TRUSTEES' ASSOCIATION

Mrs. Morrow: The Ontario Public School Trustees' Association welcomes this opportunity to appear before the committee to present our views on the subject of the amendment to the Labour Relations Act to provide for the settlement by arbitration of first-contract disputes. The Ontario Public School Trustees' Association represents 51 boards of education and public school boards in Ontario and so presents the considered views of the public education sector in the province.

The first collective agreement is probably the most significant in that all future collective bargaining works from this agreement as the base. OPSTA believes that the long-term needs of the parties are best served by an agreement reached by the parties themselves and not one imposed by a third party as the result of unilateral action, as is proposed in Bill 65. The parties themselves are always in the best position to resolve their own disputes. Arbitration can play a valuable role in labour relations as a method to resolve disputes but is most beneficial when both parties agree to its use.

3:50 p.m.

Our association is concerned that under the proposed language in Bill 65 the process of arbitration will be overused. There is concern that if a hard line is adopted in negotiations, unions will have the risk-free alternative of proceeding to arbitration under Bill 65. Unions will be able to test their bargaining power; if they feel that more can be gained, they can request arbitration.

The Ontario Public School Trustees' Association feels that the current situation under the Labour Relations Act adequately protects union and management from inappropriate conduct, in that first agreements can be imposed if there is a finding of bad faith bargaining. The bargaining power of school boards is limited by their very nature. This amendment is viewed as further limiting what little bargaining power school boards currently have.

If it is found that some changes must be made to deal with first-contract negotiations, we believe that the remedial powers to impose arbitration and therefore a first-collective agreement should be used in very limited circumstances. The legislation should not provide a risk-free alternative to hard bargaining.

In addition the Ontario Public School Trustees' Association expresses the concern that the time lines in Bill 65, within which an arbitrator must hear and make a decision, are unrealistic. While we recognize that it is important to deal quickly with these disputes, it would be rare to find that the time lines could be met, given the reality of the scheduling for arbitrators in this province.

We would entertain questions, if the committee has any for us.

Mr. Chairman: A number of members have indicated an interest already. I want to briefly ask about the missing boards. That is the wrong phrase but, for example, why is the Sudbury board not on the list of those belonging to your organization?

Mrs. Morrow: There are five trustees' associations in Ontario; three trustees' associations representing public school boards. There is the Association of Large School Boards in Ontario, the Northern Ontario School Trustees' Association and the Ontario Public School Trustees' Association is the one association that encompasses any board that wishes to belong.

Mr. Chairman: You are not an umbrella group?

Mrs. Morrow: No. The Ontario School Trustees' Council is the umbrella group.

Mr. Chairman: Thank you.

Mr. D. R. Cooke: That was my question too. Is the Waterloo region in large school board association?

Mr. Callahan: I am going to go back to the question I have asked a number of times. You seem to have some concern, as one that was expressed to me when I was in civic government, about the danger of going to arbitration. Normally the result is far more favourable than if you try to talk it out and negotiate an agreement. In this brief you are saying that, are you not?

Mr. Jakub: Yes. In essence we are saying that it looks like under the proposed bill, a union will be able to negotiate to its limits, and having found that perhaps those limits are not satisfactory in their eyes, they could then ask to go to arbitration. Arbitrators have tended to look at positions of both the parties and come down somewhere in the middle. It would appear they only have something to gain by going into arbitration.

Mr. Callahan: I also found or was told, and I have no confirmation of this, that arbitrators tend to look at comparative wage parity with other municipalities and so on, without taking a full recognition of the responsibilities, size and other determining factors in deciding whether parity is appropriate. Would you agree that is a truism with arbitrators?

Mr. Jakub: One of the factors they should look at is what other boards are paying.

Mr. Callahan: This is the question I have been trying to get answered. Is there a separate pool of arbitrators to deal with public matters, as opposed to private matters or what? That was the question I put many times to many of the witnesses. If that is not the case, if I am correct in that regard that they are the same group of people, why would unlimited access to arbitration not simply result in the party who perceives that the best deal is coming to them not bothering to bargain collectively but just let it go by attrition to arbitration?

Mr. Jakub: It seems to me you could use the same argument to say we should let every dispute go to arbitration.

Mr. Callahan: This is what I have been trying to get from witnesses all through these hearings. Most of the groups that have come before us have addressed the question of access. You are saying you do not think there should be first-contract arbitration for--many of the groups that have come before us have addressed the question of access, whether it should be automatic or whether as the government has proposed, certain preconditions would have to be met within the terms of Bill 65.

You have told me in your brief and also in your answers that arbitrators tend either to come down in the middle or to look at parity for other groups and arrive at their decision in that way. If that is the case, why in heaven would any group with automatic access to arbitration ever bother to bargain collectively? If it is to their advantage, why would they not let it go right down the tube and let the arbitrators decide?

Mr. Jakub: If they had automatic access perhaps that would happen.

Mr. Taylor: The premise Mr. Callahan is proceeding on is that arbitrators are known as being overly generous with the taxpayers' dollars. Is that a fair assumption?

Mr. Callahan: That is what I am trying to find out from these people.

Mr. Taylor: That is the impression you are conveying. That may or may not be true. I guess Mr. Callahan is saying that if this is so, why negotiate? Why not go right to arbitration? As a supplementary to Mr. Callahan's question, I would be interested in knowing whether it is your experience that arbitrators are overly generous with the taxpayers' dollars?

Mr. Jakub: That is a difficult question to answer directly.

Mr. Chairman: The point of this--

Interjection: You could answer it without prejudice.

Mr. Taylor: The next question is to identify the arbitrators and then create a hit list.

Mr. Jakub: One of the difficulties with arbitration is that in the circumstances of Bill 65, as I read it, the parties are to go out and negotiate as best they can to reach an agreement. Once an impasse is reached and in terms of Bill 65 a no-board report is issued, either of the parties can request that an arbitrator be appointed to resolve the dispute.

The Ontario Public School Trustees' Association is saying that if an arbitrator is appointed easily, the parties in negotiations--I am suggesting the unions would do this--would try to negotiate as far as they could, get the best possible deal they could through negotiations and then when their bargaining strength was such they felt they could not get any more, submit for arbitration. In that case, they would have nothing to lose. They would not get anything less than what they had already negotiated, but they would stand a pretty good chance of getting some additional items.

When we talk about arbitrators looking at other jurisdictions in determining what a fair settlement would be, that is probably easier to do when you are looking only at a salary level. It might not be all that easy to do when you do not have direct comparisons at various boards to do the comparison with; it becomes muddier. It creates more of a range of where a reasonable settlement would be as opposed to what an exact settlement should be.

Under the terms of the bill, we are not talking only about money going to arbitration. A number of working conditions could go to arbitration as well and it would be more difficult to draw those kinds of comparisons from one jurisdiction to another. It would be incumbent on the arbitrator to look at local conditions as well to influence what kind of settlement should be placed on the parties. There are a number of different factors that come into play.

4 p.m.

Mr. Gillies: I have a question regarding time lines. You have raised a concern I share that the time limits in the bill are quite unrealistic. My feeling is we should not be amending the time limits that are incumbent on the board by lengthening them. If they are gummed up and if there is a problem with a bottleneck, why should we be letting them off the hook? The onus should be on the government to put the resources in place to see that these time lines are met. My inclination is to move an amendment lengthening the time lines only for the parties to prepare their cases to go to the board, but to leave the heat on the board once you get into the 21 days and the 45 days. What do you think about that?

Mr. Jakub: As far as the Ontario Labour Relations Board is concerned, that might be appropriate. Perhaps the labour board could shift around its schedule to accommodate those kinds of requests to deal with the matter appropriately.

The private arbitrators who would have far more difficulty doing that. In obtaining a date, the arbitrators have backlogs now of anywhere from six months to a year. All we are suggesting is that in obtaining an arbitrator, having time lines that both parties are going to be happy with is not going to be met. I realize the parties can amend that, but putting it in the legislation that way does not face the reality.

Mr. Gillies: The minister can vary it too. It has been suggested to me that the minister is going to have to amend the time lines in pretty well every case that goes forward and that these limits are simply not going to be met. I appreciate what you are saying.

Mr. Mackenzie: It is worth noting the same arguments were made when we entered into the 45 days, when we expedited arbitration, that we were not going to meet the time frames. It has worked relatively successfully.

Mr. Jakub: There might be one difference with that. The minister appoints the arbitrator under the expedited arbitration, but I do not believe that under the proposed legislation in Bill 65 it will be someone who is chosen by the parties themselves.

Mr. Mackenzie: Obviously other changes have to be made at the Ontario Labour Relations Board. They use a specific panel of arbitrators for construction cases, which essentially are done fairly quickly. Many people have argued that we probably have to get into the same process, set up panels for certain cases and allow the chairmen to set the dates for a number of things that could be done to speed up the process.

Mr. Chairman: Are there any other questions or comments from committee members? Mr. Jakub and Mrs. Morrow, we thank you for appearing before the committee. We appreciate hearing your views. That completes the hearings for today. We shall reconvene tomorrow at 10 a.m.

Mr. Ramsay: Mr. Chairman, when are we going to have the discussion about whether this committee will meet regularly? Our schedule most likely will be changed as the new session opens, seeing there no longer are night sittings.

Mr. Chairman: It is funny you should ask that question. I gather there is a fly in the ointment for the hours of the new session. What was tentatively agreed on was 1:30 p.m. to 6:30 p.m. It now has gone back to the official opposition. We have the government whip here. Why do we not get a report from Ms. Smith?

Ms. Smith: We were supposed to have a meeting at noon today but Mr. Eves was sick at the last minute. The Conservatives are very strong and adamant that they do not want to come before 2 p.m. They suggest, which may be true, that the cabinet members may be grateful for that. It is a given that we are not going to come before 2 p.m. That leaves us two hours to pick up and we have to get an agreement on those two hours. Anybody who wishes may put words in my mind or your whip's mind between now and tomorrow at 3:30 p.m. when we have rescheduled the meeting.

My feeling is that David Cooke is very much in favour of having a morning meeting. Bob Nixon suggested a Monday evening meeting. There you are. I am open to anything you want. That is what we have not resolved. I think we can probably resolve everything else that is at issue.

Mr. Chairman: Ms. Smith, I will tell you something.

Ms. E. J. Smith: I know. It is getting the meeting together that has been going--

Mr. Chairman: Ms. Smith, the tentative agreement was 1:30 p.m. to 6:30 p.m., which I thought was eminently civilized. It was a late break for supper, but at least it got members out of here in time to have a decent supper hour.

Ms. E. J. Smith: They are staying with the 6:30 p.m., but they are trying to pick up that half hour.

Mr. Chairman: I hear that 2 p.m. to 7 p.m. is another possibility.

Ms. E. J. Smith: Two to seven would be a possibility. The thing that is an absolute no is 1:30 p.m.

Mr. Chairman: Perhaps I can lobby that when you are a new member the night sittings do not bother you very much, but if I can speak for someone who has been around here for many years, the night sittings grind you down.

Ms. E. J. Smith: This is what David Cooke said the other day. He felt very strongly about the whole issue. I was supposed to get the Ottawa Parliament hours from David, but I have since got them without getting them from him. They must wander in and out a lot because they go from 11 in the morning until six at night. I doubt anyone sits there for seven hours without even a toilet break. God knows what they really do.

Mr. Chairman: Anyway, Mr. Ramsay, I think it is up in the air at this point.

Interjection: It sounds as if it is up in the air.

Ms. E. J. Smith: The urgent thing is that in the meantime the ministries cannot make appointments. They do not know what they are doing.

The committee adjourned at 4:10 p.m.

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STANDING COMMITTEE ON RESOURCES DEVELOPMENT

LABOUR RELATIONS AMENDMENT ACT

WEDNESDAY APRIL 2, 1986

Morning Sitting



STANDING COMMITTEE ON RESOURCES DEVELOPMENT

CHAIRMAN: Laughren, F. (Nickel Belt NDP)

VICE-CHAIRMAN: Ramsay, D. (Timiskaming NDP)

Callanan, R. V. (Brampton L)

Gordon, J. K. (Sudbury PC)

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Pierce, F. J. (Rainy River PC)

Smith, E. J. (London South L)

South, L. (Frontenac-Addington L)

Stevenson, K. R. (Durham-York PC)

Taylor, J. A. (Prince Edward-Lennox PC)

Substitutions:

Brandt, A. S. (Sarnia PC) for Mr. Pierce

Cooke, D. R. (Kitchener L) for Mr. McGuigan

Gillies, P. A. (Brantford PC) for Mr. Gordon

Clerk: Decker, T.

Clerk pro tem: Arnott, D.

Callfas, D.

Staff:

Madisso, M., Research Officer, Legislative Research Service

Witnesses:

From the Hamilton and District Chamber of Commerce and the Small Business Exporters Group:

Logan, W. D., Chairman, Subcommittee of Industrial Relations Committee, HDCC

From the Ontario Mining Association:

Reid, T. P., Executive Director

Keenan, J., Member, Labour Relations Committee; Director, Labour Relations, Noranda Inc.

McLean, E., Chairman, Labour Relations Committee; Manager, Industrial Relations, Rio Algom Ltd.

From the Canadian Federation of Independent Business:

Andrew, J., Director, Provincial Affairs

Gray, B., Vice-President and General Manager

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Wednesday, April 2, 1986

The committee met at 10:19 a.m. in room 228.

LABOUR RELATIONS AMENDMENT ACT
(continued)

Consideration of Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: I hate to break this up, but it might lead to a new accord so I had better. The committee will come to order.

This morning, we have three presentations, but you could say it is four because Mr. Logan is with us and he is representing two organizations, the Hamilton and District Chamber of Commerce and the Small Business Exporters Group. There are others he could represent as well, but he has restricted himself this morning to representing only two groups. Mr. Logan, welcome to the committee. We are pleased we were able to reschedule to have you here this morning.

HAMILTON AND DISTRICT CHAMBER OF COMMERCE
SMALL BUSINESS EXPORTERS GROUP

Mr. Logan: It is a pleasure for me to come before you to air the opinions of two groups, one large and one small. I would like to have the opportunity to answer some questions first. I know there will be questions asked by all sides before not too very long. The question I would like to answer is, "What happened to my left arm?"

Ms. E. J. Smith: I want to ask you whether you were extra billed.

Mr. Logan: As a matter of fact, no, I was not.

Mr. Brandt: Did you call your doctor?

Mr. Logan: Yes, I did.

Mr. Brandt: That proves the point we are trying to make.

Mr. Ramsay: Is this the social resources committee?

Mr. Logan: Is this not the social resources committee? What happened to my left--

Interjection.

Mr. Logan: I had a very carefully prepared presentation which is deteriorating.

Mr. Mackenzie: Formality does count.

Mr. Logan: Thank you, Mr. Mackenzie. On May 26, 1985, I happened to be standing in the path of a falling plate of steel. It was a rather large plate of steel. It did a bit of damage to my left arm. As a matter of fact, it

completely crushed my wrist. On the good side of things, it was my company's product that cut that steel and the steel was not hurt.

The severity of the injury was great. I have had to undergo ongoing operations. The last operation, on Thursday of last week, was only one of a number of them. Any pain and discomfort I might feel from this arm is far overshadowed by the butterflies I feel because I have not sat before a committee of this nature before. The nature of these butterflies is that you have heard presentations from many people, many of whom I am sure are far more astute and knowledgeable than I am on these issues.

That brings me to a thought that was conveyed by Elizabeth Taylor's sixth husband on the night of their wedding. He said, "I know what to do, but I hope I can make it interesting."

Mr. Mackenzie: The local chamber is improving.

Mr. Logan: I sit before you representing two views from two distinct bodies; one of them is the Hamilton and District Chamber of Commerce, and the other is the Small Business Exporters Group. I would like not to confuse the presentations submitted by each respective group, although there is a lot of overlapping area in both submissions.

Now, I state categorically that I am not a lawyer, nor do I pretend to be.

Mr. Gillies: It is a point in your favour.

Mr. Ramsay: Mr. Callahan pretends to be one.

Mr. Logan: I would also like to mention that I am not a redneck. I am a businessman. I am the owner of a small company in Hamilton. The nature of my business is distribution of industrial compressed gases and ancillary products and supplies such as welding products and safety equipment.

I stand before you with concerns that are genuine and sincere. They are appreciative of the multifaceted nature of the proposed legislation. In saying that, I want to make very clear that both groups making submissions here, as well as your humble servant, respect the rights and privileges of workers to form collective bargaining units and thus represent their views to management. This is a sacred trust enshrined in our legislation and one we all respect.

Lastly, I beg the indulgence of this committee in case I commit any faux pas.

I would like a point of clarification here. You have before you two submissions. Would you like me to go over these point by point? Would you prefer an oral presentation on them?

Mr. Chairman: The committee is quite flexible. I notice your submissions are quite brief. If you want to go through them, that would be fine.

Mr. Logan: Starting with the Hamilton and District Chamber of Commerce presentation, I think this chapter of the chamber needs no introduction. It is a rather large organization representing a large group of very homogeneous, in one sense, yet very different businessmen throughout the Hamilton and district area.

One of the concerns the chamber has is the use of the word "frustrated." This is a term that appears to be very imprecise. There is no clear-cut feeling about what "frustrated" means. The chamber feels this is an improper word to use.

The whole point of this legislation has to be brought into question. I am referring to paragraph 1 in the "Issues" section. It has to be brought into question because present legislation has been very successful; so successful that very rarely are bad-faith bargaining cases brought under it. The issues addressed in Bill 65 are allegedly to correct the problems associated with our present Labour Relations Act.

There does not appear to be a need for change of the present legislation. If this amendment proves successful, it will remove from the present free collective bargaining process some of the alternatives to which each party has had recourse during the negotiating procedure. Walkout or lockout tactics are two of them. These are tactics; they are very bona fide bargaining tools.

If mandatory arbitration comes into effect, very truly the efforts of one or the other party, or all parties, can be frustrated by calling for arbitration rather than for the successful conclusion of negotiations.

It is suggested that this first-contract arbitration takes away from the intent or the spirit of free collective bargaining. It takes away in the sense that management knows that, should it take a certain stand, it will be short-circuited into mandatory arbitration. There is no free collective bargaining. There is no bargaining at all; there is intimidation.

In a similar manner, if the union position is untenable to management, here again the mandatory arbitration can be called into effect. That will take away from the free collective bargaining nature in which both parties are trying to participate.

This brings up the matter of realistic and objective bargaining postures. This is not new to me. I am an employer who must take hard postures on a day-to-day basis. These hard postures are not just with our bargaining unit; they are with suppliers, bankers, customers and employees. If we are going to restrict the hardness of a posture, then we are handcuffing business and we are interfering in business.

Who is to determine what a realistic bargaining posture is? Should it not be both parties involved? If the bargaining agent has oversold his benefits, is this to be considered realistic and objective? Perhaps it is. However, if an employer does not have the economic means by which to meet certain demands or if he has corporate restrictions that do not allow him to meet certain demands, is this to be considered unrealistic and not objective bargaining posture? I think this type of legislation handcuffs both sides.

10:30 a.m.

With reference to the threshold issue of entitlement, there are four criteria. Again, these four criteria are very vague. It is suggested that these four criteria try to define bad-faith bargaining or something less than bad-faith bargaining.

In a meeting with members of the industrial relations committee of the chamber of commerce in Hamilton on March 29, the Minister of Labour (Mr. Wrye)

explained that these criteria were designed to identify less than bad-faith bargaining positions which offend the intent of collective bargaining. This is very imprecise. It opens an entire new section that might be considered less than bad-faith bargaining but qualifies as bad-faith bargaining. It is suggested the present interpretation of bad-faith bargaining be used in this section.

A point that has already been discussed is that this legislation does not take into account the financial circumstances of the employer.

Another section of the proposed amendment, clause 40a(15)(b), refers to "the terms and conditions of employment...for employees performing the same or similar functions in the same or similar circumstances...." That is open-ended.

Mr. Mackenzie and I know the Hamilton east area very well. Our wage scale there is different from the one in Mr. Cooke's area in Kitchener. There are regional differences that very plainly affect the wage scales, working conditions and terms of employment in those two areas. The same thing applies between Mr. Gordon's area in Sudbury and Mr. Gillies's in Brantford. These are all different.

What we have here says, "Because General Motors gets a certain amount in Oshawa, we in St. Catharines ought to get the same amount." I think this section should be tightened immensely. An imposed contract should reflect the norm in that area for that industry.

In like manner, a two-year term may or may not be the norm in a given area. If it is not and you saddle the bargaining unit with a two-year contract, you are doing it a disservice. You are also doing management a disservice if two-year contracts are not the norm. The length of the term of the contract should be determined by the practices in the area where it is negotiated.

I think we can make the point that first-contract arbitration has not proved successful in other areas. In British Columbia, it was put into place and has not been used. If it has not been used, that tells us it is not effective. It is almost the same type of legislation that is proposed here. Let us save ourselves a little time and effort and forget about it. You say, "That is not possible." In Manitoba, this same legislation was passed and we see some detrimental effects there: jobs were lost. How much more detrimental can you get than that?

Lastly, the chamber questions whether 55 per cent of a company's employees filing for union certification is truly representative of the entire working body contained within the bargaining unit.

In summation, the Hamilton and District Chamber of Commerce opposes Bill 65 in its present form and wishes to communicate to the standing committee that it supports the present collective bargaining system.

Are there any questions?

Mr. Chairman: I was skimming through your brief on behalf of the Small Business Exporters Group. Do you want to deal with that separately?

Mr. Logan: Yes, I do.

Mr. Chairman: There are some questions from members of the committee on the brief on behalf of the chamber of commerce.

Mr. Mackenzie: The difficulty I have in going into any detail at all is a very simple one. The chamber has taken the position, as other chambers have, that there is absolutely no need or justification for the bill. I could give that a little more credence if I saw an answer from your chamber or any of the other chambers about what made this bill necessary in the view of our party, the Liberal Party and, for a short while, the Conservative Party in this House. The Conservatives seem to have reversed their position.

We are not dealing with a lot of cases, but with some very nasty first-contract situations where it is obvious the employer has decided there will be no union in his operation. There are some classics around, whether you deal with Radio Shack, the caisse populaire in Kapuskasing, Irwin Toy in Toronto or a number of other examples. Are these just aberrations as far as the chamber is concerned? How do we deal with situations such as these where even the bad-faith requirements meant months or years and the eventual loss of the workers' bargaining rights?

The difficulty I have is that the majority of the members of this House have decided such legislation is necessary. It is difficult to take seriously a number of the suggestions you are making when they are all based on the premise that there is absolutely no need for it. There are no counter-arguments to deal with some of the nasty situations that have done much to poison labour relations in this province. They are usually bitter and long. They usually involve women or ethnic employees. We have had all too many examples of these, albeit they are a small percentage of the number of negotiated contracts. I see nothing whatsoever that recognizes this as a problem. When I do not see that, I do not know what merit there is in the presentation.

Mr. Logan: I will try to answer your questions and present the chamber's views. I do not purport to know all the technicalities, but from a layman's point of view, you are quite correct in saying there are some aberrations in the system. We can expect aberrations to occur in any system. We can add Visa and Eaton's to Irwin Toy, the caisse populaire and Radio Shack.

Mr. Mackenzie: Any number of them actually.

Mr. Logan: They all have a remarkably similar profile: big business and big unions. In the case of Visa, there is \$1 million on the side of labour. God bless them for having \$1 million.

Mr. Mackenzie: There are several billion dollars on the side of the bank. That was an exceptional collection of funds for a specific purpose. It is not a normal deal. That was a small union, I might say.

10:40 a.m.

Mr. Logan: It was a small union. It is enough to say that we do not have access to funds from either side, but that is neither here nor there. This is big money back and forth. This legislation is global. This legislation is not saying, "We are going to earmark only those big companies which have the wherewithal to withstand a certification drive." It is saying, "We are going to apply this legislation to everybody."

I am speaking here as a small businessman and not for the chamber. As a small businessman, I do not have the wherewithal to come up against the International Brotherhood of Teamsters, the United Auto Workers or the United Steelworkers of America. If I do spend some of my valuable resources, both

time and money, to combat these drives, which are in some cases a little aggressive, I come out on the short end of the stick. It is not fair for the small businessman.

You also mentioned that women and ethnics are involved. I would add to that, youth and unskilled labour. More often than not they are at the bottom end of the employment scale. I am not saying this globally for women, ethnics or youth, but you often find a certain portion in there. I do not know what to say when it involves big business. I can say the small businessman is more likely than not to take care of his female employee, his ethnic employee and his young employee. These are valuable resources in his company and he cannot afford to lose them. Therefore, I think we have an inequity.

Mr. Mackenzie: May I ask you one final question? I am sure you must be aware of the preamble of the Labour Relations Act, wherein it says, "Whereas it is in the public interest of the province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees."

Mr. Logan: We have no qualms about that in the chamber and, as an individual, I do not have any qualms about that either. In my own company, there is a very fine bargaining unit and a very fine business agent. We get along fabulously.

Mr. Mackenzie: You recognize this preamble means very little to somebody who says, "There is not going to be a union in this plant, I do not care what." I could give you some of management's quotes in the case of Irwin Toy or a few of the other plants.

You are talking about fighting their attempt for certification and what not. The Labour Relations Act, unless we throw it out, simply says it is not only a right but is also in the public interest.

Mr. Logan: Of course it is; that is recognized. However, by the same token, it is the public's right not to go into a bargaining unit. This is not a mandatory type of thing. There is freedom here to go into or not to go into it. If employees wish to go into a bargaining unit, God bless them for it. It is management's responsibility and right to make sure they are well taken care of.

Mr. Mackenzie: To go back to my original point, I am not sure we are going to impress one another with our arguments necessarily. If I had heard from one of these briefs some method of dealing with the aberrations, as you call them, and I suggest they are not necessarily so, then I would give a little more credibility to the argument that says we do not need this legislation. The decision has already been made by a majority of members of the House that we do need it. That is why it is before the committee.

Mr. Logan: Fortunately, I have one more crack at the cat here, so to speak, with my next presentation. I hope that will be the one submission which gives some method of dealing with this item.

Mr. Chairman: Mr. Logan has another presentation to go through, so I encourage members to be very brief.

Mr. Gillies: I have one or two questions. A couple of the points you have made in your brief are well taken and will be considered by some of the

members of the committee for possible amendments. I would like to ask you specifically about the last point regarding the certification process. First, could you elaborate on your concerns in this area and whether you have any suggestions about how that process might be improved?

Mr. Logan: No. It is a very difficult point to address. It is my understanding, and I would like to be corrected if I am wrong, that 45 per cent of a company's employees can call for a certification vote. This 45 per cent will then call into question the wishes of the other 55 per cent of the company. Once the question of certification is tabled, and there are a lot of tactics involved, on both sides, mind you, that might raise an eyebrow. Many of the tactics management has employed in past decades have now been successfully addressed by bad-faith bargaining legislation.

However, there still remain some inequities on the bargaining unit side. For example, there is no requirement for a secret ballot vote when it comes time to vote on certification. You can have a secret ballot or it can be open. In a large company, I do not suppose that makes a heck of a lot of difference. In a small company, say 10 people in a bargaining unit, everybody knows who is voting which way. That is one of the points this section addresses.

Mr. Gillies: There can indeed be a secret ballot. As you know, it is contingent on the percentage of employees who send in their cards and so on. What I am trying to get at is the premise of what the chamber is saying here. What better method would there be of determining whether there should be a bargaining unit than by an expression of one percentage or another of the workers involved, whether it is 45 per cent, 50 per cent, or 55 per cent? How would you do it unless you had some expression from the workers whether they want to form a bargaining unit or not?

Mr. Logan: I do not have an answer. I am going to seek the protection of the phrase, "Please do not shoot the messenger." Quite frankly, I do not have an argument or a suggestion to table here.

Ms. E. J. Smith: Not to repeat anything that has already been said, I am stuck with one problem with your, other chambers' and similar presentations. Obviously, a good contract comes from a reasonable division of strengths. We have agreed here that big employers have an unfair advantage in first-contract negotiations, especially because they go beyond the normal struggle to keep out a union. They are willing to put up a good deal of money up front for the long term. They consider it good. We hear from you and from others this great fear that a strong union will equally bully a small businessman.

When we had union people here, they presented us with examples, cases and averages of the settlements they have made, which have not been excessive. I cannot help but be struck with this. We hear examples and cases of big businesses such as those for which we have had the histories in front of us. Unless I missed something in one meeting I missed, we have no statistics that show the full picture. The United Steelworkers of America is a big organizer of small groups, which I did not know until I sat on this committee, but its statistics have told us it does not get big settlements and no one has told us otherwise.

The only person we have seen come in with a strong case of that kind was a woman who was an Ayn Rand type--complete freedom of everything--who came in and presented us with a case of gangsterism, seemingly, in her account of a union, and so it had very little to do with this bill. Nowhere have we had examples of the big unions moving in with unwieldy and unfair settlements.

Mr. Logan: Dolly Foran is a hard act to follow.

Mr. Chairman: How did you know that? She did not mention anyone's name.

Mr. Logan: I heard the tom-toms.

I respect your view. It is very simple to say big unions against small business is unfair, but it is very difficult to back it up because there are no statistics on this. You must actually go out and cull information from each and every small business that is affected by an inequity in size.

10:50 a.m.

Ms. E. J. Smith: I would have thought a chamber of commerce would be just the sort of group that could draw together those figures, if they exist.

Mr. Logan: Yes. The chamber of commerce can do this, and if it is a point that is requested of the chamber, it will undertake to provide you with as much information on this as it can.

In my specific example, dealing with the United Steelworkers, we have a very small company dealing with a very large union whose demands were very great. Not only were their demands very great, but they were also ill-prepared. Our bargaining was hard. Over the course of time, we have gained mutual respect for each other and we have come to a satisfactory first contract and, very soon, a satisfactory second contract.

Ms. E. J. Smith: Did you feel there was a severe imbalance of power?

Mr. Logan: Yes.

Ms. E. J. Smith: In what way?

Mr. Logan: In the sense that the steelworkers have a great amount of funds available to them to dedicate to my small company; a business manager, lawyers, people dedicated strictly and solely to this type of activity, which is fine. They are entitled to that.

Where does the disadvantage come in? We do not have people for that. We have to scrounge around to find people to fulfil the roles that are required in this type of negotiation, and this affects the productivity of our company. That is one way.

I can spout some horror stories as well. There have been intimidation practices--

Ms. E. J. Smith: We all agree that intimidation is not permitted.

Mr. Taylor: But it exists.

Ms. E. J. Smith: Yes. It exists on both sides. We cannot write it out of the legislation because it is already written into the law.

Mr. Mackenzie: Were lawyers for the steelworkers involved in your negotiations?

Mr. Logan: Yes. There were two of them.

Mr. Mackenzie: That is unusual. The committees do almost all the bargaining in Hamilton right up to the top companies. I would be interested in the circumstances. It is a standard policy that lawyers do not negotiate steelworker contracts.

Mr. Logan: They were not involved in negotiations. There has been no lawyer involved in negotiations but a number of points were called into question in the certification process, and there was an unusual ruling made in our instance where we have three bargaining entities in three separate and respective--

Mr. Mackenzie: That is an entirely different matter though. That would be one of the in-house lawyers, probably Mr. Shell, in terms of certification. That has nothing to do with the negotiations.

Mr. Logan: Mr. Shell is a very fine man, very astute.

Mr. Mackenzie: It has nothing to do with the negotiations whatsoever. You told us you were able to bargain hard and got acceptable first and second contracts.

Mr. Chairman: Let us get back to the point made by Ms. Smith.

Mr. Logan: One of the inequities here is that it cost my company a great deal of money, and this money is very substantial to our profits and insignificant to the steelworkers. The steelworkers have lost 500,000 jobs over the past--

Ms. E. J. Smith: It is not insignificant to the employees though.

Mr. Logan: I am sorry?

Ms. E. J. Smith: The risks to the employees, in a sense.

Mr. Logan: No. My company includes the employees at all levels. The amount of money we have earmarked for this type of activity has been substantial. In terms of balances, it is a significant percentage for us and an insignificant percentage for the steelworkers. However, we have been protected by present legislation. We have bargained hard, and present legislation has told us how far we can bargain, how hard a stance we can take. Present legislation has also told the business agent and the bargaining unit how far they can go. It has worked out very well.

Ms. E. J. Smith: The real problem comes back to the definition of "frustrated" not being sufficiently clear.

Mr. Logan: It extends farther than that. There is no need for this legislation.

Ms. E. J. Smith: I tend to agree with Mr. Mackenzie. We are going off on a red herring. We have the bill in front of us and we are trying to improve it.

Mr. Logan: "Frustrated" has to be changed.

Mr. Chairman: Mr. Callahan, do you have a question?

Mr. Callahan: We have the suggestion that "frustrated" would be

replaced by "unsuccessful." How does that sound to you?

Ms. E. J. Smith: It was suggested yesterday.

Mr. Callahan: It was suggested yesterday by the Ontario Secondary School Teachers' Federation or one of those groups.

Mr. Logan: I thought I had a great idea for my next submission. I agree with you. It is in my next submission.

Mr. Callahan: The second thing I note in your brief, although you say there is no need for anything other than section 15--but setting that aside for the moment--is that if the bill goes through, you are not in favour of automatic access to arbitration without any preconditions. That is probably a rhetorical question.

Mr. Logan: Yes.

Mr. Callahan: You say the present sections are simply not precise enough, but you have indicated to us that you agree that what is being proposed is something less than bad faith.

Mr. Logan: Yes, what is being proposed is less than bad faith.

Mr. Callahan: Do you say that yourself, or do you say that as a result of having taken advice from legal counsel to the chamber?

Mr. Logan: Did we take legal advice?

Mr. Callahan: I would not want to think it was just Mr. Wrye who told you that and that is what you are relying on. With all due respect to the minister, we would like to know whether you have had independent advice.

Mr. Logan: I have lots of faith in what our ministers say to us and I like to believe that is the way it exists. To answer your question, the subcommittee which dealt with this first-contract arbitration received advice from legal counsel, who clearly identified this amendment as being less than bad faith.

Mr. Callahan: Can you tell us the name of that counsel? We are trying to put them all together to see if we can get them all to agree. There seems to be legal representation in this province that will give you an answer, depending on how many quarters you put in or something, or who you are acting for really.

Mr. Logan: I do not see any problem with that. The legal counsel who advised us, on a voluntary and complimentary basis, was Paul Wearing.

Mr. Callahan: Is he a labour lawyer?

Mr. Logan: I guess he is.

Mr. Callahan: An experienced one?

Mr. Logan: I hope so.

11 a.m.

Mr. Taylor: It has been my observation on this committee that employers have consistently come out against the need for this legislation. The evil is not great enough to warrant this response in legislative form. On the other hand, unions have consistently been supportive of the legislation, saying it is necessary to the extent that they are prepared to forgo to some degree the ultimate in voluntary negotiation of contract and accepting the imposition of a commercial contract upon them, which, in my experience, has been foreign to the philosophy of the labour unions. Whether it is a Toronto Transit Commission strike, an elevator operators' strike or whatever it is, there has been a complete opposition to legislation that would mandate a settlement.

Here is a breakthrough because there is acceptance of the principle of an arbitrated settlement instead of suffering through long strikes. Do you not see that as being very progressive on the part of organized labour?

Mr. Logan: I do not--

Mr. Mackenzie: Look for the hook.

Mr. Logan: Yes. The employers have said that there is no need for this, and they have said so time after time, because present legislation has been successful in addressing the many needs that arise from first-contract negotiations. Approximately 400 first contracts are negotiated every year. My source of information is the Minister of Labour.

Mr. Gillies: Mr. Callahan makes it an issue.

Mr. Callahan: Are you trying to get me in trouble?

Mr. Logan: Of those 400, I suggest there are perhaps less than five per cent, perhaps less than two per cent, that find themselves in a bad-faith bargaining situation, and bad-faith bargaining is clearly defined in the present legislation. It addresses those points. If we have that, why change something that has worked so well?

As far as union support for this legislation is concerned, the wording of the proposed amendment is very unclear and very imprecise; it lacks precision. It does not take into account many of the needs of employers. Inasmuch as it does not take into account the needs of employers, it not only puts in jeopardy the employer's relationship with his employees, but it also puts in jeopardy the entire business.

Mr. Taylor: You seem to be intimidated as a small businessman. You seem to think this intimidation will be rampant among small businessmen. What is the fear that has been conjured up in your imagination?

Mr. Logan: Yes, I am intimidated, speaking--

Mr. Taylor: As an individual.

Mr. Logan: --as an individual. If I were to go out and start a new company with 22 employees or 15 employees, and if those employees said to me, "We want a bargaining unit," I would say, "Fine, let us discuss what we are going to do."

Let us say I put this new company in your riding, Mr. Taylor.

Mr. Taylor: I already admire your judgement.

Mr. Logan: Then the fellows will say to me: "Look, Mr. Logan, those guys down in Oshawa get \$15 an hour and they have to work only 32 hours a week. Their overtime starts after 38 hours, and they get one and three quarters time for overtime. That is what we want."

I have limited funds and I have just started my new little company in your riding. These people come to me with these exorbitant demands, which will completely undo my business plan. If I start a new little company, the first thing I want to do is get market share. One of the ways to do that is by undercutting competition. If I have to pay more than I expected, or if I have to pay wages that are arbitrarily imposed upon me with no consideration for my economic wherewithal, I am in trouble. I am intimidated. If that contract is for two years, I am intimidated. With all due respect, I am not going to open that company because I am going to think once, twice or three times about the consequences downstream.

Mr. Taylor: At present, there are very few problems with first contracts. We have heard the same litany of large corporations which have made the procedure unhappy and tortuous and have prompted this legislation, in some people's eyes. Do you see some acceleration of this type of fear in reality? Will the legislation introduce new elements that are not present now that will bring about the uncompetitive situation of which you are afraid?

Mr. Logan: We are changing the rules.

Mr. Taylor: That is right.

Mr. Logan: This legislation will change the rules. Are there no present problems? Of course, there are present problems. Mr. Mackenzie has very succinctly and capably pointed out there are aberrations. Of course, there are aberrations.

However, we will be in a completely different ball game. For example, subsection 40a(15) imposes punitive criteria. If I bargain hard but the arbitrator says I have bargained unreasonably, there will be just cause to attach a punitive condition to the settlement that is imposed upon me and the employees.

Mr. Taylor: I am going to try to keep this going. I know we are going to have a conference right here, but you are now approaching the problem of the arbitrator. As I understand in all my innocence, an arbitrator is an evenhanded, intelligent, well-informed, fair-minded individual who wants to do what is right for the workers and the employers so that everyone can live happily ever after.

Do you have a different impression? Are you afraid the arbitrator is not going to be as evenhanded as he or she might be? Is there some fear that what might come down because of this forced settlement is not going to be something the employer can live with?

Mr. Logan: You pose some very difficult questions here.

Mr. Taylor: I appreciate there is normally a fear of the unknown.

11:10 a.m.

Mr. Logan: I do not believe the fear of the unknown comes into play here. It is the fear of previous precedents. I think fear of historical decisions comes into play here. Although we would like to think all arbitrators are fair and just, I think of what my lawyer tells me whenever are in court, and thankfully that is not too often. I said once, "All I want is justice." He replied, "You mean all you want is justice and costs." I would like to think all arbitrators are fair and equitable, but it has not proven to be the case in some instances. There is enough deviation from the norm, shall we say, to call into question the power that is given to arbitrators. If arbitrators are given the power enshrined in this amendment, they will be able to do virtually anything they want.

I will further underscore this by saying that they can do anything they want because of clause 40a(2)(d), which says, "any other reason the board considers relevant." What does that mean? Further, clause 40a(15)(c) says, "such other matters as the board or board of arbitration considers relevant." Please, this is incredible power and it changes the entire scope of first-contract negotiations. It gives altogether too much power to a government entity. With all due respect, the government entity is there to give justice.

Mr. Taylor: Not justice. I do not think you should confuse law with justice.

Mr. Chairman: The law society will hear about this.

Mr. Taylor: Courts of law or legal tribunals are not necessarily courts of justice.

Mr. Ramsay: Now I am getting disillusioned.

Mr. Callahan: That is why justice is blind.

Mr. Logan: In summation, I would say that, although in the past we have noted the somewhat labour-oriented tendencies of arbitrators, which is fine, we feel this type of amendment will give them altogether too much power and will cause an imbalance in favour of labour.

Mr. Taylor: The Windsor Chamber of Commerce stated that this legislation would adversely affect the starting up of new business, certainly by people coming into the province from other jurisdictions. I think the reference was to the United States being on the border. Do you subscribe to that?

Mr. Logan: Speaking on my own behalf--I am not empowered to so state on behalf of the chamber--yes, speaking personally, I would consider very closely whether I should open up a new company in the province, given this first-contract legislation--a new company, whether it is manufacturing or a service organization.

Mr. Chairman: Mr. Logan, I do not want to be unfair to you any more than I want to be unfair to groups that are to follow you. We have a major presentation at 11 a.m. and another one at noon. I wonder whether you could take us quickly through the brief on behalf of the Small Business Exporters Group.

Mr. Logan: We have covered many of these points; so I am going to go over this speedily.

First, I want to make a full disclosure on the Small Business Exporters Group. This is a group that was formerly associated with the Canadian Association--Latin America and Caribbean, which met an early demise in March. The work that was carried on by the small business committee was judged to be important enough to present to this standing committee. As a consequence, the name was changed to Small Business Exporters Group, and I represent the views of 11 businessmen, of which I am one.

The concern is that the increased costs that will be imposed upon small business by this legislation will cause a small businessman or small business that is exporting to lose its competitive advantage.

Mr. Mackenzie: Would that be because of the bill or because of the union?

Mr. Logan: It would not be because of the union but because of the wording in this bill.

The Small Business Exporters Group addresses the point of whether this is applicable to small business or whether it rightfully belongs to a more restricted grouping of big business and big unions. The question is asked, "Is this needed?" The use of the word "frustrated" is judgemental, accusatory and vague. It also implies conflict. I do not think there is any way we can get around that. It is suggested that other terminology be used such as "collective bargaining that has not reached a satisfactory conclusion." "Satisfactory" or "successful" would do. The word "frustrated" should not be in there at all.

On the threshold issues, we have already discussed in the previous submission "the refusal of the employer to recognizing the bargaining authority...." I submit the same argument applies here. As well, the same arguments apply for clauses 40a(2)(b), (c) and (d).

The recommendation of the Small Business Exporters Group is that if this bill is necessary and if a threshold criterion is necessary, which obviously it must be, then the bad-faith-bargaining provisions of the present Labour Relations Act should be employed as the entitlement to binding arbitration.

With respect to clauses 40a(4)(a) and (b), I have dealt with unions and you have dealt with unions. You have dealt with management and with government. I do not think anybody can do this within 21 days or 45 days. It is impossible. Suppose management is ready but the union has some other contract on the line, or suppose the board has four other cases. They cannot get to it within 21 days. I do not think it is reasonable to impose a time limitation. Instead of a time limitation, it is recommended that "as soon as possible" be substituted, which I submit to you is reasonable.

Subsection 40a(10): This proposed legislation is already in effect. It is redundant and we do not need it.

Clause 40a(15)(a): I would like to spend a little time on this. The term "reasonable efforts" lacks precision. It does not give consideration to the financial circumstances of the employer or to his ability to pay. This section gives the arbitrator altogether too much power in coming to terms with his decision. If the employer is determined to provide unreasonable efforts, who knows what that is? The arbitrator can cause havoc in that company.

What about the union? What happens if the union is judged to be

unreasonable? What are we going to do there? Are we going to decertify it? Are we going to ask it to pay a penalty?

Ms. E. J. Smith: You arbitrate. That is what this legislation is all about.

Mr. Logan: Well, yes; we will arbitrate.

11:20 a.m.

Ms. E. J. Smith: It is to correct the imbalance on either side. You address it as though it is only going to correct an imbalance on one side.

Mr. Logan: This arbitration calls for clear-cut penalties on the employer's part. Those clear-cut penalties can be punitive and they will mean higher costs.

Ms. E. J. Smith: It seems to me you are crying wolf on behalf of the arbitrator, who has not even sat down yet. He may find the union guilty.

Mr. Logan: I think this section treats both employer and union equally and fairly. It is not judgemental of the arbitrator.

Ms. E. J. Smith: Who is going to be--

Mr. Logan: It calls into question the terms of reference that are available to the arbitrator. These terms of reference are altogether too vague.

Ms. E. J. Smith: That is a different point.

Mr. Logan: It actually puts the arbitrator in a very uncomfortable position. Speaking on behalf of this group, we do not believe clause 40a(15)(a) should be within the terms of reference. As far as clause (b) is concerned, this has already been discussed in a previous submission and we need not discuss it further.

In clause (c), "such other matters" falls into the same classification of too much power. It is unreasonable for the arbitrator to have to use that much power. The terms of reference for the arbitrator should be far more clear-cut. That paragraph should be removed.

The two-year contract has already been discussed. I feel it is unreasonable and this group feels it is unreasonable as well. The proposed contract should reflect the norm in the industry for that area.

Mr. Taylor: Why do you say two years is too long?

Mr. Logan: It could be too short. Your point is well taken. It could be too long and it could be too short.

Mr. Taylor: What are you suggesting?

Mr. Logan: That the length of the contract be in accordance with industry standards or practices in a particular industry in a particular area.

Mr. Taylor: You would leave it open-ended.

Mr. Logan: Yes. Speaking as management, I can see advantages to one

year, two years, three years or five years, but you ought to have those alternatives to work with.

The next point has not been addressed before and I think will address one of the questions Mr. Mackenzie raised. The construction industry has been excluded from this legislation, and that is well and fine. You ask how we deal with the inequities of big business, big unions and the aberrations of these powerful companies that can delay the legislated rights of our province's employees.

Mr. Mackenzie: To make it clear, I did not say big unions and big companies. I do not recognize the particular argument you are making, but I did say the aberrations we have had.

Mr. Logan: I stand corrected. I do not mean to put words in your mouth.

Mr. Chairman: Mr. Mackenzie, stop slowing Mr. Logan down.

Mr. Logan: That is well and fine. If we are going to exclude the construction industry, let us exclude small business. You will say: "Why? How? That is against the Charter of Rights. You cannot do that." Of course, you can, if you can exclude the construction industry. The construction industry is composed of industrial, commercial and institutional groups, power groups that are all commercial and residential. By and large, the residential groups do not fall into any legislated agreements. They are like small business. They are protected from all this.

Let us include small business. I am not sure whether this is it and someone will correct me, but I believe it is enshrined in some legislation or some wording of either a federal or provincial nature that small businesses are companies with fewer than 50 employees if they are service organizations and fewer than 100 employees if they are manufacturing entities. Failing that, I suggest that you exclude or remove the construction industry from this exclusion; it is not fair.

Mr. Taylor: It is discriminatory.

Mr. Logan: Mr. Taylor, it is discriminatory.

Last, to make this amendment retroactive is to change the rules after you have played the game. I do not think that requires a lot more discussion. In summation, Bill 65 is certainly ill advised, given the existing safeguards in the Labour Relations Act. These provisions have proven to be most effective in preserving the integrity of the free collective bargaining regime in the province.

Mr. Chairman: Dare I suggest to members of the committee that we call a halt now and move on to the next submission? Thank you very much for both of your presentations. The committee had a chance to exchange views with you on the first presentation. In the interest of fairness to the groups that are to follow, we should call a halt now.

Mr. Logan: I thank you very much for the opportunity to appear before the standing committee on resources development. Before I leave, I would like to ask one quick question. Is there any comment on the suggestion that small business be excluded from this legislation?

Mr. Chairman: The only comment I will make is that if an amendment to exclude small business is put to the committee, it will be dealt with by the committee. You are right in that there are provisions made in the tax laws for small business separated from large business, so it would not be a precedent that was unheard of in the province. It is up to members of the committee whether they want to move such an amendment. I cannot presume what they will do.

Ms. E. J. Smith: My only comment is be that it turned out that Dominion Stores was small business when it came to laying off people.

Mr. Chairman: Because of the individual locations.

Ms. E. J. Smith: Yes. I am thinking of the bitter ones we have had, Eaton's and so on.

Mr. Chairman: It does lead to other complications. Thank you very much for your presentation. The committee members appreciate it.

Mr. Logan: I thank the committee for its time.

Mr. Chairman: The next submission is from the Ontario Mining Association. It hosted a very fine affair last night. I see some of the same faces before us this morning that we saw last night.

Mr. Reid: The faces looked better last night.

Mr. Chairman: Yes, that is right. Patrick, welcome to the committee. I presume you will introduce your colleagues.

ONTARIO MINING ASSOCIATION

Mr. Reid: I am Patrick Reid, executive director of the Ontario Mining Association. On my immediate left is John Keenan, director of labour relations for Noranda Inc. minerals. He will present our views on this legislation. On his left is Ed McLean, Rio Algom's manager of industrial relations and chairman of the Ontario Mining Association industrial labour relations committee.

11:30 a.m.

If I may take a few seconds, the Ontario Mining Association is composed of some 35 member companies that produce metals and minerals in the province. Our members range from rather large companies such as Inco Ltd., Falconbridge Ltd., Rio Algom Ltd. and Denison Mines Ltd., down to smaller companies such as Canadian Salt Co. and Steep Rock Resources Inc., some of which are situated in both northern and southern Ontario.

Mr. Chairman: Even the Griffith mine.

Mr. Reid: Even the Griffith mine the other day.

Mr. Keenan will not read the brief per se, but will comment on the particular aspects we wish to address and then we will be available for questions.

Mr. Keenan: As Pat just said, it is not our intention to go through each section of the bill. In our submission, we have chosen to address

specific areas of the bill. We feel that if they are legislated as currently presented, they will work against the best interests of employees and/or employers in the province and have a potential for increasing industrial conflict. It is our belief the intent of the government in introducing this bill is to reduce industrial conflict.

In the first instance, we believe the act should provide a greater role for the mediation services of the province. As an industry that is very organized by trade unions, we have had considerable experience over a number of years with the Ontario conciliation and mediation service. Along with others in our profession in other industries and in other parts of the country, we are very impressed with the competence and professionalism of the mediation services.

It is our belief that in every case where an application is made under this act, the minister should be involved initially in the appointment of a mediator. When bargaining has failed, there should not be a referral under the act until a mediation process has taken place, following the normal process of conciliation. We believe the mediator's efforts and his report on the issues between the parties should be submitted to the board as part of the documents and evidence it should consider in determining whether to refer a matter to first-contract arbitration. Throughout the brief, we have proposed the language of amendments that follow these suggestions.

We believe the board should be given greater direction than currently exists under subsection 40a(2). The board should be instructed through the legislation to consider the conduct of both parties. We also believe, as I am sure many speakers before us have said, that the board should be required to take into account the usual tests of bad faith.

The language of the bill as proposed now, under clause 40a(2)(d), provides that "any other reason the board considers relevant" is a sufficient directive. The committee should remember that bad-faith criteria are not peculiar to Ontario. They have been developed by this board and by boards across Canada as well as in the United States in legislative situations similar to what we have in this country. They have been developed over a great many years and represent a distillation of labour relations wisdom that we do not believe should be ignored. We have proposed an amendment that besides leaving clauses 40a(2)(a), (b) and (c) under the present bill, also calls on the board to consider all the facts, the conduct of both parties and the existence of bad faith.

Moving to another point the previous speaker addressed, we feel very strongly that the time limits currently set out in the bill are quite unreasonably short. Bargaining does not always occur in small situations with very simple issues. For example, in our business, bargaining is a major endeavour that continues under normal conditions for a number of months. Labour costs in some metallurgical operations can run 40 to 50 per cent of total costs. We fear the unreal time constraints provided by the bill are going to jeopardize the interests of both parties and we strongly urge that these time limits be extended, not just as is set out in subsection 17, which allows extension by mutual agreement, but that the basic time limits themselves right from the beginning, should be at least double what they are set out at.

Subsection 12 provides that once a decision has been made to proceed with the arbitration of a first agreement, any strike or lockout must cease. We believe the limitation which provides that unless there is a permanent

discontinuance of all or part of the business of the employer, all the employees on strike or locked out must be recalled, completely fails to recognize that during the passage of time business conditions change, sometimes as a reflection of the time of year and demand for certain products of a company. Weather has a serious effect, particularly in an organization where the work is performed to a large part outside of buildings. Raw material supplies affect the ability of a company to get back into production rapidly. There could be transportation problems. For example, there could be a transportation, railway or trucking strike going on which may limit a company's ability to resume its normal operations. We urge you, under the proposed amendment, to extend the term "permanent discontinuance" to include the words, "where because of current business conditions, or the temporary or permanent discontinuance."

The bulk of the subsection, which calls for the greatest comment from our association, is subsection 15, which sets out the criteria which the arbitration board, or the labour relations board, as the case may be, should take into account in determining the provisions of a first collective agreement. We are very concerned here that because arbitration of collective agreements is not uncommon in the public sector, and provided for under various public sector legislation, there may be an assumption held by a great number of people in the province that given this type of experience, arbitration of collective agreements in the private sector can very easily be handled. Our position is that such an assumption is totally false. Private sector interest arbitration is virtually untried and unknown in the labour relations system. We are going pell-mell into it through this bill. We believe that in drafting the legislation, a considerable lack of concern has been shown to the fact that the private sector obviously operates in the realities of market competition, while the public sector, which is where the experience is, does not. It seems to us vital that boards of arbitration, or the Ontario Labour Relations Board, as the case may be, should be mandated under this section with very clear guidelines as to the terms that it may impose in first collective agreements.

Before getting into what sort of guidelines we have in mind, I would point out that I read in the paper this morning that Bob White thinks that would be bad law and we certainly agree with him. The function of an arbitration board under this subsection is to determine the terms of a collective agreement. It is not to determine whether the parties have exercised reasonable efforts and then having made such a determination, accept some kind of retribution. That should be struck very promptly because of the punitive effect it might have and the very bad message it leaves an arbitrator.

11:40 a.m.

Moving on to the guidelines with which we believe boards should be mandated, we feel the terms proposed under the bill are not sufficient. We do not live in a closed collectively bargained environment. Somewhat fewer than 40 per cent of nonagricultural employees belong to unions; and a great number of those work in the public sector. A large majority of employees in this province work in the unorganized private sector and cost competition for unionized companies does not just come from union represented plants; area labour market competition does not come solely from union represented operations.

We believe that the criteria set out for the direction of arbitrators must include the local labour market, both union and nonunion. It must include the competitive conditions in the industry in which the employer is engaged.

That is the competition he faces. If he is an exporter, then it should take into account the competition he faces offshore and it should take into account where considering a unionized comparison, the length or age of the bargaining relationship.

In our industry we have been bargaining with a number of unions for 25, 30 or 35 years now. Collective agreements made after the eighth or tenth renegotiation are very much different than first collective agreements. We believe the arbitrators should be required to look at first collective agreements. We think this section should be redrafted. We made proposals for amendments.

We believe that arbitrators must be given realistic direction based on how the private sector determines its end point. Again, we have to realize that arbitrators, who have experience in determining the terms of collective agreements, have gained that experience in the public sector. The public sector collective bargaining field is considerably different than the private sector. The arbitrator must be directed to his findings based on how the private sector determines its bargaining end positions.

Finally, on this point of amendments to subsection 15, we would like to draw to the committee's attention that since all of the articles in the collective agreement agreed to already by the parties will find their place immediately in the new agreement, every clause in addition to that will be a clause which has not been agreed to by the parties. It will be from the arbitration board. Therefore, it will be unsatisfactory to some degree to one or the other party. It will create a potential for continuing conflict. We believe, therefore, that the arbitrator should be required, be mandated or directed, to limit the arbitration award to those areas which are common to first agreements and not to expand or become creative in its decision making.

The next point that we would like to draw attention to are the problems that will result from the mandatory two-year term. Our own experience in collective bargaining is that quite often when we meet with the union in collective bargaining, it is to the best interest of one party to seek a shorter term; sometimes it is to the best interest of both parties. This may depend upon any number of situations, not the least of course being business or market conditions.

Our feeling here is that mandating a two-year term is a serious mistake. We believe the bill should be amended to provide that the arbitrator may exercise discretion with a one-year term or a maximum of two years or any period in between. We believe that in determining an appropriate collective agreement, that is one of the factors that the arbitrator should be directed upon and not put in the position where, because of lack of knowledge of future market conditions or future business plans, be in a position where he has to mandate a two-year term, even though that might not be in anybody's interest. We recommend that be changed to give discretion within that time period.

Our next concern under subsection 19 is the excessive retroactive effect of the legislation. To the best of our knowledge, this has no impact upon our members within our industry, but it seems to us to be very bad practice to impose a significant retroactive effect on legislation, particularly legislation of this nature. We recommend that the bill, if and when passed, should not be retroactive any further back than the date of its first reading.

Finally, there are the recent amendments proposed by the minister dealing with the situation should employees file an application for

decertification or should another union file an application for certification to replace the existing union. The discretion given to the board under the latest amendment to choose whether it would accept to deal with an application for first contract arbitration or an application for decertification or an application for certification by an alternate union is a denial of the rights, either of the secondary union or of the employees. The boards should not be given this discretion.

In our opinion, it is not appropriate that the incumbent union can avoid meeting the wishes of employees as to their representation simply by making an application. The board should be directed to deal with applications by alternate unions or by employees for decertification first before dealing with an application under this bill.

Those highlight the areas of the bill about which we have concerns. I have gone through them fairly rapidly. I hope our position on this is not necessarily seen as an endorsement of the principle of this act. As an industry, we question whether this legislation was needed, but given that the bill has been introduced, given the position as it stands, we believe it is incumbent on us to help you to create legislation which will work and which will serve the purpose of furthering industrial relationships in the province.

Mr. Chairman: Thank you, Mr. Keenan. I think I speak for the committee when I say that we appreciate the disciplined way in which the brief was done and the way you specifically addressed proposed amendments. That is helpful to the committee.

Ms. E. J. Smith: I concur; that was an excellent presentation.

There are two things I wanted to ask, one of which I know there is almost no answer on, except legalistically. First, you say there should only be comparison with first agreements. You are not the first person who has suggested this but you have expressed it very clearly.

My problem is, taking a given industry, there a clauses in there that say you should compare with other people, union and nonunion. I would tend to agree with that if it is a first contract in a general business. If they are the first contract in that type of business they still have to compete with all the nonunion people. You are pointing that out, that they are a threat to the company.

It would be inconsistent, if you get to the point that you are doing a first agreement in an area that is largely unionized and, therefore, it is not up against that pioneer-type risk, that they should only be able to look at other first agreements. That might take you back to agreements that are completely outdated, as you say, when the competition is doing better by the employees.

11:50 a.m.

Mr. Keenan: I do not think we look upon it in a historic context of looking back at the first agreements that occurred 10, 12 or 15 years ago in other competitive industries. We are talking in this about current experience in first agreements.

Ms. E. J. Smith: I am assuming they stay somewhat within their own

field of competition. If you are in the shoe business, you are looking at what the shoe market will bear, so to speak.

Mr. Keenan: Yes. Our concern is the one we made quite clearly, that if the arbitration board looks at more than the clauses that are common to first agreements, then it--

Ms. E. J. Smith: That was later on in your brief, the comment on first agreements. That was the second one. It was earlier on page 7. Your comment about agreements was earlier on in your brief, were they not? Maybe I have the wrong--

Mr. McLean: It might be helpful to understand that part of our concern is what we would call the operating language in the collective agreement. The more mature collective agreements contain practise restrictions that are a reflection of the relationship of that particular employer and the union involved. They are just as concerned about transporting the relationship, if you will, with another employer to a collective agreement that is being arbitrated under this bill. I dare say we were not really as concerned about the monetary aspects of the settlement. Generally, in my experience, they fall where they will.

Ms. E. J. Smith: No, forgetting those monetary aspects and what have you.

Mr. McLean: It is not a great problem, but to transport restrictions that are probably not appropriate to that relationship--they may be so well entrenched--

Ms. E. J. Smith: If an industry has reached a certain labour peace and, generally speaking, the companies in that business get on pretty well with their unions, it seems to me it should be valid for the arbitrator to look at the kind of agreements they have.

Mr. McLean: Again, we are talking about the work practice.

I was also going to mention the fact that in my experience, and I think it is fairly universal, the unions, especially the bigger unions, serve up to any employer they are bargaining with, a boiler-plate set of demands, which are very comprehensive and are what we would call in some cases products in the wish book. The process of bargaining takes care of the realities of the situation with that employer. It seems to us that the arbitrator could get unduly confused with trying to figure out the right relationship for the people, as opposed to the economics of the settlement. There is usually no problem with that.

Ms. E. J. Smith: The other question, addresses more the legality, because there is certainly no way we can get into a discussion here about wages paid in Korea, and the suggestion was foreign competition. It seems to me it could open up a hornet's nest of people talking about what you are paid in the Caribbean, Korea, China or whatever.

Mr. Keenan: I think the concern largely is the market in which the employer competes.

Ms. E. J. Smith: You do compete with Korea for running shoes.

Mr. Keenan: If we are trying to sell a product in the United States,

and we are competing in the United States market with United States manufacturers and offshore manufacturers, whether from Europe or South America, the reality of our business requires that we remain competitive in the market where we are selling our product. This means we have to be competitive with the people selling in that market too. If we lose our place in that market, we have fewer jobs.

This is the point we are trying to make. When we go into bargaining, when we determine what, if anything, we can afford to increase our labour costs by, whether these are wage costs, indirect costs or through restrictions on productivity or whatever, the whole compendium comes together as total labour cost. When we determine whether we are in a position to increase our labour cost by such and such an amount and no more if we are going to retain our position in that market, then we determine our bargaining positions based on those factors.

What we are saying here is that the arbitrator in a first contract must also look at those; they are the factors that govern private sector bargaining. That is the point we were trying to make. It is not really relevant in public sector dispute bargaining, in hospital disputes--

Ms. E. J. Smith: No, I was not thinking it was.

Mr. Keenan: The fact is, though, that is where arbitrators have their experience. We are trying to point out that private sector bargaining is very different.

Ms. E. J. Smith: I am staying strictly with the thought that it could get dragged out over so many days and months. If you started comparing with some foreign standards, you get below the minimum wage before long.

Mr. Keenan: We are not saying to compare the wage levels in Korea or the wage levels in Singapore with our wage levels. What we are saying is that we have to look at our competitive position in the markets in which we are selling our products.

Mr. Reid: It should be pointed out that about 80 per cent of Ontario's minerals are exported, and about 65 per cent go to the United States; so that is important.

Ms. E. J. Smith: I was not thinking of just the mining industry.

Mr. Reid: I realize that.

Ms. E. J. Smith: If it said just "American" in here, it would not present for me this question I am posing.

Mr. Gillies: I had two questions, and Mrs. Smith asked both of them. I would just add to the other comments, though, and say what an excellent and very well prepared brief you put before us. I think it is one of the best we have had.

Mr. Callahan: Oddly enough, she asked my questions too.

Mr. Chairman: This is truly a remarkable day in the life of this committee.

Mr. Taylor: Again, there is a repetition of what we heard from the

previous brief; that is, the legislation as drafted will not work in the best interests of either the employer or the employees. I am back to my conundrum where the organized labour groups that are seen to act in the interests of the employees--I do not know whether that is acceptable or not, but presumably that is their role--take the opposite position, that the legislation is in the interests of the employees.

I do not know whether you are speaking on behalf of the employees or whether they are, or whether they are speaking on behalf of management as well as the employees. There certainly seems to be a difference in viewpoint in regard to the impact of this legislation on the relationship or the general accord between management and labour and the economic health of the province. I would like your comments on that.

Mr. Keenan: We have two concerns. One is that when we talk about the legislation not being in the best interests of the employees and employers, we are looking at two different levels. One is the mechanics. We have tried to identify some of the mechanics of the bill where we believe they conflict. For example, we think the recall provisions after a strike or lockout will cause a lot of bad blood. If those are not amended, we believe a whole new area for industrial conflict will be created. We have tried to identify certain areas such as that where we think the mechanics of the bill as proposed will lead to conflict and poorer relationships.

On a broader scale, we are concerned that with the lack of direction to (1) the Ontario Labour Relations Board and (2) boards of arbitration under the bill as currently constituted, there may well be a tendency for there to be a significant increase in referrals because, unless subsection 2 is changed, in many cases it will be easier to do that than to bargain. Second, unless subsection 15, dealing with directions to the arbitrator, is changed, there may well be a tendency among arbitrators to impose terms that business will not be able to support economically. That will lead to a reduction in the number of jobs, and that is not in the interest of employees.

Those are the two areas where our concerns are that the bill as constituted will work against the best interests of employees.

12 noon

Mr. Taylor: That is a fairly consistent message from management. As I say, however, it has not reverberated from the labour side yet.

Mr. McLean: Why are you so surprised at that? If I were a union organizer running around trying to sell my union, I would like nothing more than to present a no-risk situation to people I am trying to sell to.

Mr. Taylor: When I say that, though, I am accused of being cynical.

Mr. Reid: It was never my experience that you would be--

Mr. Taylor: I am simply exuding my innocence in all of this and proceeding on the basis that everyone is operating in the best interests of the worker on the job.

Mr. McLean: The organization they serve.

Mr. Mackenzie: What we are finding out (inaudible) the way it is written.

Mr. McLean: We are talking here about the notion of, say, Lee Iaccocca--since the Americans have been brought into this in other ways--the level playing field notion. Again if I were a union organizer, I would love to be able to say to somebody: "I am going to get this, this, this and this for you. The bottom line is you do not have to strike, and you will not be any worse off in any event." That is a nice sales technique to have. That is not to say we oppose unionism; we do not. As Mr. Keenan points out, we are one of the most highly organized industries in this province.

Mr. Taylor: That is as I understand it.

Mr. McLean: Presumably, we can speak with a lack of bias in that respect.

Mr. Taylor: That is why I was interested in the projections in terms of the utilization of this legislation. I have been struggling to find the evil this legislation is supposed to address. It has not been all that prevalent, although certain hard cases have been brought out. I wonder whether the legislation would do more damage than good in its implementation.

What you are saying is that you anticipate an increase in organizational activity because you can give a guarantee for first contracts and that might necessitate arbitration on those first contracts. Do you have any further projections or just a guess?

Mr. Keenan: I cannot guess. It is just for the reasons Mr. McLean states. This legislation, as it exists, is a very useful tool in union organization. Therefore, there will be more organization, presumably more certifications and presumably, therefore, an increasing number of referrals. What the numbers might be, I do not want to guess.

Mr. Callahan: That is interesting. I gather you are saying that with subsection 2 there, that will happen. If there were unlimited access, it would be even greater, I suppose. It might almost be a floodgate situation where you no longer would have collective bargaining in this province to a large extent.

Mr. Keenan: One of the points that was raised while we were waiting dealt with the preamble to the act. The preamble to the act, as we all know, encourages collective bargaining in the best interests of employees in the province. The one thing that neglects is that the act then goes on to construct a very carefully defined adversarial process. An adversarial process by nature, and as the act is set up, necessarily provides that not everybody is going to win.

What we have under the present act is a situation where on occasion a bargaining unit is formed that is, as the act sets forth, in the best interests of employees and employers and the people of the province. However, because we have an adversarial process, that bargaining relationship never comes to fruition in the form of an agreement. The act is based on that type of adversarial relationship.

If we want to change the whole rules of the game essentially, perhaps we should also be looking at the preamble to the act and saying something like,

"It is public policy that all employees in Ontario be organized into trade unions." That is essentially the way this is going.

Mr. Callahan: That is the point we have put to other groups. First, if you had unlimited access, which is what some groups are asking for--no preconditions to access--you would have a floodgate approach, particularly if either the employer or the employee found that the arbitrators were being very kind and generous in their terms of collective agreements, because they might decide, "Why bargain collectively?" You have agreed there would be an increase. You have said there would be an increase even with subsection 2 in there.

The second thing is, do you agree that subsection 2 is something less than bad faith?

Mr. Keenan: Our position is that bad faith, as currently defined through a tremendous amount of jurisprudence, not only in this province but also in the United States and elsewhere in Canada, has served the test of time very well.

In the brief, we have tried to recognize that legitimate concerns have been raised as to whether the definitions and restrictions of the jurisprudence are perhaps a little too narrow and therefore the board ought to be given a little more licence to look into some other factors. What we have tried to do in our proposals is to recognize the desire to give the board a little more licence, but nevertheless not to give it carte blanche to make subjective judgements based on nonessential issues.

Mr. Callahan: I am not sure if you have answered the question. The question I asked was, do you interpret the present clauses 40a(2)(a) to (d) as being something less than the rather onerous bad-faith position?

Mr. Keenan: We interpret them as being quite significantly less.

Mr. Callahan: All right. Just to go back to your position, you stated that the preamble to the Labour Relations Act sets up an adversarial system. Surely that adversarial system as set up is all well and good, but it has been frustrated--maybe I can direct Mr. Taylor to the very evil this bill is intended to overcome--by the intransigent employer who simply says: "I do not care if you are certified. I do not care if you have a union. We are not going to recognize the union."

I do not know whether this is correct, but we have heard during the hearings that in those particularly hard-nosed positions, they have not been able to meet the bad-faith test and that the adversarial system has been frustrated by those types of situations, such as in the cases of Radio Shack and the caisse populaire up north somewhere. Sorry about that, Patrick.

Mr. Keenan: As I recall, in the Radio Shack case the board found bad faith and did require the parties to agree to a certain number. They used remedial powers that currently exist within the board--very extensive remedial powers--to act in the Radio Shack case and to all intents and purposes put together, in large part, a collective agreement which they required the parties to accept as a result of these findings of bad faith.

Mr. Taylor: And fined them.

Mr. Keenan: And fined them substantially.

Mr. Callahan: Carrying on to the next step, to put them in the position of being fined does not enhance the second-contract negotiations.

Mr. Keenan: In fact, the second-contract negotiations in that company went quite well; the third-contract ones did not, but I think that was because of economic factors I am not aware of.

Mr. Callahan: That is an interesting statement.

Mr. Mackenzie: That corporation has more than 70 plants in the United States, and its pride and joy is that it has never had one of them organized. To this day, it is still fighting the organization up in Barrie.

Mr. Callahan: Thank you.

12:10 p.m.

Mr. Ramsay: Mr. Keenan, having listened to the union groups that have come before us, I do not think it is their will or their wish to rely on this piece of legislation. All the groups have stated they want to negotiate a contract. From what they have told us, it appears to me they wish to have this legislation there only as a last-ditch safety net for those difficult situations.

I believe them because it would appear the unions would be rendered impotent in a sense in the eyes of the people they are representing if they could not deliver contract and always had to rely on arbitrators to bring them in. They want to show they represent their people and can deliver contracts for them. If they do not, the people are going to say, "What the hell do we need them for?" They want to negotiate and they want to say, "We represent you and we are going to do a job for you." They do not want to rely on third parties to impose contracts.

Mr. Keenan: In the final analysis, if they cannot deliver, they are now home free in the sense that they will not be put in the position where they have to either go into a strike situation or surrender bargaining rights. The adversarial provisions of the act, which the whole law is structured on, are removed in this instance.

Our point is that you cannot have it both ways. If you want an adversarial act where the balance of power is on your side--and it is often on the union side; unions that represent companies that have perishable goods or that have serious financial problems and so forth hold the balance of power--if you want the balance of power on your side in those situations, you ought to be ready to accept that sometimes, as in the cases you talked about, the balance of power is on the other side. That is central to the whole philosophy of our law of labour relations. This bill is going to substantially change it. All we are trying to say is, "If it is going to be changed, at least let us try to preserve some modicum of balance in it."

Mr. Chairman: Mr. Keenan, Mr. McLean and Mr. Reid, thank you for presenting the brief on behalf of the Ontario Mining Association. We appreciate hearing your views. As you have heard from some members of the committee, they appreciated the quality of your brief as well.

Mr. Reid: It was our pleasure.

Mr. Gillies: I would like to ask Mr. Reid whether he agrees the Liberal government really dropped the ball on this one.

Mr. Reid: I would like to comment on that. In leaving, I might say I am happier on this side of the table than I was over there the last couple of years. My heart goes out to you having to listen to all this.

Mr. Chairman: That is the answer to your question, Mr. Gillies. Thank you, gentlemen.

The next presentation is from the Canadian Federation of Independent Business. We have Judith Andrew and Brien Gray here. The committee welcomes you. We appreciate the fact that you have taken the time to prepare a brief, and we look forward to hearing your views.

CANADIAN FEDERATION OF INDEPENDENT BUSINESS

Mrs. Andrew: I am Judith Andrew, director of provincial affairs for the Canadian Federation of Independent Business. On my right is Brien Gray, our vice-president.

Our brief is fairly short. If it pleases the committee, I would like to read our brief into the record.

CFIB is a nonpartisan, political action organization which represents in excess of 75,000 independent Canadian-owned businesses, more than 34,000 of which do business in Ontario. Our membership is broadly representative of the business population by size and by sector of activity.

The sector we represent is not, as many believe, on the periphery of business activity. Small firms comprise the majority of business firms in Canada. Of the 757,000 firms in 1983, 98 per cent had fewer than 50 employees and 94 per cent provided fewer than 20 full-year-equivalent jobs.

New Statistics Canada data show that, between 1978 and 1983, thousands of new and small enterprises with fewer than 20 employees accounted for 100 per cent of all new jobs created in the private sector. Small business employment growth actually compensated for a 15 per cent decrease in jobs among medium and large firms during that period.

For the period from 1978 to 1982, for which more detail is available, small firms with fewer than 20 employees accounted for two thirds of the net increase in full person-years of employment. When we disaggregate the net increase in jobs, the amazing 143 per cent contribution by business births to the job creation phenomenon is evident.

Small businesses are continuing to provide the overwhelming proportion of new jobs in Canada and, largely because of this fact, the independent business community promises to be a powerful and important agent of change through and beyond this decade. The overwhelming contribution of business births and of small firms to the job creation phenomenon reflects the capacity of these flexible, agile businesses to react rapidly to changing market opportunities.

In some quarters the prevailing belief is that the only fair and effective way to establish terms and conditions of employment is through

collective bargaining. While collective bargaining works well in some situations, a unionized regime should not necessarily be regarded as the norm or as the only form of relationship desired by employees.

The preamble to the Ontario Labour Relations Act indicates that a primary goal of the legislation is to further harmonious relations between employers and employees. Unionization is but one means to that end and, where it exists, it seems to us to be most appropriate in a large-firm setting. In the large-firm context the collective voice function of the union streamlines the determination of terms and conditions of employment.

The post-war structure of Canadian collective bargaining developed in the context of big business and big labour. The legislation was designed to deal with those large collective interests that were dominant at the time. More recently, with small business and entrepreneurship playing an increasingly important role in the development of our economy, it is evident that labour law generally, and collective bargaining law in particular, are not moving in tandem with the changing complexion of business. Even the present legislative proposal is premised on a handful of large-firm cases in which the union is seen to be disadvantaged. The reality is that small and medium-sized enterprises are disadvantaged by collective bargaining law, which assists strong, well-financed unions in their dealings with tiny owner-managed firms.

Generally, the regulatory environment should assist business in providing the wealth and the employment that are key elements of social policy; it should not prevent it from doing so. Since regulations bear more heavily on small firms--and labour regulations are no exception--proposals for new labour regulations should take account of the modest resources available to the small firms to deal with them. Typically, the small business owner has no phalanx of operational vice-presidents, no retinue of lawyers or accountants, not even a personnel department. He or she must hire, train and manage employees directly. Most owner-managers would be ill-prepared to deal with an application for certification and subsequent labour arbitration of a first contract. Certainly the speed at which all of this could happen would make their heads spin.

12:20 p.m.

Ontario's proposed first-contract legislation, Bill 65, is a reflection of the government's belief that unionization at any cost is better for employer-employee relations than no unionization at all. The Canadian Federation of Independent Business is opposed to first-contract legislation, as it amounts to a legislated organizing drive of smaller firms and may not properly take into account employees' wishes in the matter. Certainly this amendment would greatly assist union organizers, who could then promise prospective members an arbitrated first contract rather than the distasteful possibility of a strike.

The British Columbia experience is instructive with respect to the adequacy of the legislation in reflecting employees' wishes. Evidence shows that a high proportion of unions gaining their agreement by virtue of the legislation were subsequently decertified by employees. The Bill 65 method of addressing this potential impediment to the spread of unionization is covered below.

Employees' wishes may also be subordinated by the undemocratic aspects of the certification process for unions. Currently, a supervised secret ballot

of employees is not required. This casts doubt on the extent of employee support of the union. To provide for the imposition of a first contract virtually guarantees a resolution to a union that may not represent the interests of the majority of employees. First-contract legislation should be contemplated only if an amendment to the Labour Relations Act is made to provide for a supervised secret ballot vote of employees on the certification application.

The refusal of the employer to recognize the bargaining authority of the trade union, cited in subsection 40a(2), is given as a reason for allowing access to arbitration. We submit that a question of union recognition would not arise to the extent that it does if the employer were convinced that the majority of his or her employees supported the union in a secret, democratic vote of the employees.

On access to first-contract arbitration: This subsection reads as an indictment of the employer, implying that only the employer could be guilty of an unreasonable bargaining stance that has frustrated the contract. It is equally possible that the union could be making unreasonable demands in the context of the specific situation.

The ostensible aim of this subsection is to remedy inappropriate behaviours. However, the threshold test is so permissive that, in practice, the vast majority of cases, if not all, will be referred to arbitration. This provision requires the Ontario Labour Relations Board to inquire into the substantive nature of the proposals and to render a judgement on whether those proposals are reasonable. With due respect, officials of the board are not well qualified to judge the economic matters underlying a particular bargaining stance.

In practice, "frustrated" will come to mean any bargaining that does not conclude in a first agreement, and "unreasonable" will be any employer who does not accede to union demands. The smaller firm owner will be at a great disadvantage if, for example, in bargaining for the survival of the firm he risks having an equally damaging contract imposed.

The provisions in clauses 40a(2)(a) to (d), inclusive, should be deleted and replaced with a test of bad-faith bargaining. Bad-faith bargaining is a test that has been considered by the board for some years. The criteria that are currently proposed for access offer great potential for unfair decisions, since the board would have unnecessarily wide latitude to judge on unfamiliar matters.

Criteria for arbitrators: The requirement that the arbitrator consider whether the parties have made reasonable efforts to reach a collective agreement suggests a punitive element and should be deleted. This type of judgement is relevant only to the access question, where the parties fail to bargain in good faith. It is not acceptable to legislate this bias as a criterion for arbitrators. If the purpose is to prevent the parties from behaving outrageously, then the secret ballot vote, combined with the legislated duty to bargain in good faith, is sufficient.

The requirement to compare to the terms and conditions of employees performing the same or similar functions is to entrench a law similar to the decree system in Quebec. That system imposes on all firms in certain industries the terms of a collective agreement negotiated by a large union and large firm in the sector and deemed by the minister to be appropriate for the

sector. In many cases this is a crushing blow, as it limits the capacity of the smaller firms to compete.

Data from CFIB's January 1985 Hard Facts Survey covering factors influencing pay rates for employees identified "ability of your firm to pay" as the premier consideration, with "need to pay a living wage" exerting significant influence on pay rates. Smaller firms do pay slightly less than the average for all firms: about 13 per cent for 1983 in firms with fewer than 100 employees. This does reflect their more vulnerable financial position. Young firms typically endure the early years without any profit at all. More than half of all business corporations do not make profit in any one year.

Clause 40a(15)(b) should further define "similar circumstances" by specifying a broad comparison to firms of the same size, age and sector of activity. The phrase "negotiated through collective bargaining" should be deleted.

A broad comparison of terms and conditions of employment in similar unorganized firms is essential because these firms are the competition. The arbitrator should not be permitted to impose terms and conditions drawn from a long-standing bargaining relationship in a single large firm or even a handful of large firms. This provision would compensate to some extent for the arbitrator's lack of experience with business, particularly small business economic realities.

The term of operation: As we mentioned above, the unique way in which the government intends to address the problems encountered in British Columbia and elsewhere is to impose an agreement for two years rather than for one year. It appears that this provision is designed to frustrate applications for decertification. Given that the contract terms may be retroactive to the day notice to bargain is given, the effect of this provision is to install the union for some months in excess of two years.

The term of the imposed contract should be for one year, to begin on the day its terms come into effect. If we accept that the aim is to promote harmonious labour relations and not unionization per se, there is no benefit to lengthening the imposed contract, thus postponing the day when the parties must bargain together.

Retroactive application: It appears to be the intention of the government to revive a number of stale bargaining relationships that have not resulted in a first contract since January 1, 1984. First-contract-arbitration legislation should be applied only to cases where bargaining rights are acquired after proclamation of the legislation.

To enact law retroactively goes against a principle of justice which holds that citizens must abide by laws currently on public record. Just as with retroactive tax changes, it would be unthinkable that labour legislation could be changed to have retroactive application clearly designed to assist a particular interest.

Concurrent applications for certification and termination: In the situation where an application for first-agreement arbitration is before the Ontario Labour Relations Board and other applications have been received, the board is given wide discretion to consider the applications in the order it considers appropriate.

Subsection 40a(20) should direct the board to consider first

applications brought by employees and then other applications at its discretion. If the board were to plough ahead with the first-contract-arbitration application, ignoring the employees' application for termination, no one's interest would be served, least of all that of the employees. In our view, the interests and wishes of the employees are paramount and should be accommodated by preferential consideration of their applications.

Small firm impact statement: Given the very significant differences between the operations of small and large firms and the pre-eminent role of small firms in job creation, a small firm impact statement should be undertaken and made public.

Government regulations impose a greater burden on smaller firms, yet all too often they are carried forward without any impact analysis. The impact statement should note the estimated effects on each small business, including the impact on job creation and on the migration of small industry. Seemingly minor items such as the cost of presenting a case before the board and gathering information for arbitrators may be revealed to be significant problems in the light of the modest resources available to small firms.

12:30 p.m.

In conclusion, we appreciate the opportunity the committee has afforded us to appear before you to present our concerns about this legislation. We believe we bring you a unique perspective that is all too frequently overlooked by policymakers when they design labour legislation.

At a time when our economy is in a state of fundamental change and when we have many unemployed or displaced workers, legislators should be very cautious about imposing further rigidities and costs on the job creators, the thousands of small firms throughout Ontario.

Thank you. We will be happy to receive your questions.

Mr. Chairman: Thank you, Mrs. Andrew, for a very nicely put together brief. Several members have indicated an interest in asking questions.

Mr. Brandt: Let me compliment the delegation for what I consider to be a very succinct and clear statement of your position, one that, as a result of the tone of the brief, causes me some difficulties with respect to some of the suggestions you are making.

I get the distinct impression, as one of my colleagues, Mr. Taylor, addressed to an earlier group, that if your figures are correct--and I have no reason to suggest they are not--100 per cent of new jobs are created by small business by definition. I gather it is your position, and you reinforce it in the last page of your brief, that this legislation could well dissuade and/or slow down job creation through small business, which is creating virtually every new job in our economy. I want to get your position on the record.

Mrs. Andrew: That is correct. We believe that further rigidities placed on smaller firms in the form of labour regulation may have that effect.

Mr. Brandt: You mentioned in the course of your brief that unionization is not necessarily the only way to go and that it may not have application in very small companies in a great many circumstances. You did not cover in your brief the percentage of unionized workers within the category

you represent. You have 75,000 members across Canada and 34,000 in Ontario. Do you have an idea of the percentage of unionization at present within the businesses and workers you represent?

Mrs. Andrew: Yes, we do. The January 1985 Hard Facts Survey gave us some data for making an estimate of approximately 12 per cent of the firms and 23 per cent of the employment in that sector. A smaller proportion of our members are unionized than in the economy as a whole.

Mr. Brandt: Recognizing that you have a very substantial number of firms, both in Ontario and in Canada, that are represented through the submissions you have made to us today, could you give me some brief indication of how your organization goes about determining the position you are going to take? Obviously, it is impossible to be in touch with and to get the acquiescence of 75,000 businesses stretched across this very large country of ours. How did you arrive at the position you are putting before us? Does it truly reflect the views of your members?

Mrs. Andrew: The federation has a policy-setting vehicle, entitled Mandate, our publication sent to members eight times annually. Policy questions are posed in that vehicle. We did pose a question on legislation providing for mandatory arbitration of first collective agreements. Of the decided voters, 59 per cent were against and 41 per cent were for mandatory arbitration.

Mr. Brandt: That is interesting.

Ms. E. J. Smith: Closer than we thought.

Mr. Brandt: Yes, very much so.

Mrs. Andrew: Let me elaborate. We do get a good return on these policy votes, in the range of 22 per cent to 25 per cent on a mail-in vote. That is excellent. We feel there are quite a number of tiny firms that do not think they will ever be faced with this kind of situation. They probably have very little understanding of what this means and that is reflected in the vote.

Mr. Gray: To clarify a little bit, because we represent not only small firms but also in many cases microfirms, our process of determining policy through votes of membership democratically is the way we go about developing policy, largely because these people simply cannot attend meetings. They do not have the time or the wherewithal to get there.

Another thing about it is that often those who attend committee meetings are at a certain extreme one way or the other of a view on an issue; not always, but it can happen that way. That can bring a bias that is not necessarily the view of the collectivity. We try to get a view of the whole group out there rather than those who are able, because they can attend committee meetings, to influence public policy.

One of the problems we have with some other groups is that those members who can attend meetings can dictate policy for the larger group. In our system that is not permitted to happen. The voting policy is a constraint, not only on the position as dictated by members but also because no one member has more influence than another and no staff member has any influence over the direction of the membership.

Mr. Brandt: Are you suggesting that if the vote had been reversed,

if there had been 41 per cent in opposition and 59 per cent in favour, you would--

Mr. Gray: If the vote had been reversed, then we would probably be here discussing support for the bill. We are directed by our membership.

Mr. Brandt: I see. It is that strong a signal for you.

Mr. Gray: Some votes are far stronger than others. The right to strike in the public sector is one that raises a great deal of concern in our sector. Those votes will be a lot more in favour of the withdrawal of the right to strike, say, than an issue such as this, which is different from their perspective.

Mr. Brandt: I wonder if you could elaborate very briefly on the comments you made on retroactivity as it relates to this legislation. The concern you indicated is the unfairness of it and you compared it to a retroactive tax as an example. I want this clarified for my own information. Is it your position that if this bill becomes law, it should only be effective and be applicable to firms that start up from the day following the passage of the bill? Is that what you are saying in that comment on retroactivity? Could you expand on that a bit?

Mrs. Andrew: To firms that are certified following proclamation of the bill; that is correct. Not only firms that begin operations but also firms that are certified. We have read the transcripts of this committee. There are some, primarily large, firms that would be captured in this retroactivity, but we have no idea how many small firms are involved. On the principle of justice, to enact legislation retroactively, broad-brushing it to capture certain large firms, may be exceedingly unfair to small firms.

Mr. Brandt: Thank you, Mr. Chairman. I have other questions but I will give up the floor to other members.

Mr. Callahan: Do you have any hard facts to support the idea that if there were a secret ballot, negotiating a first contract would be much easier going, or is that just a conclusion your association has drawn itself?

Mr. Gray: Over the years we have gone after our membership on a wide range of issues. We have not gone specifically after that issue, but we have had overwhelming discussion from the membership on labour relations issues. They feel if they had confidence that the ballot was one that was not unduly influenced and that was done in a secret way, they would have more confidence in the entire system and would probably be less inclined to resist it. We have not asked that as a direct policy question, but the testimony from members directly involved in these issues is that it would be a helpful thing from the point of view of their confidence in the act and its operation.

12:40 p.m.

Mr. Callahan: Do you have any stats, or perhaps we could get them through our research department, of the number of firms, particularly in the small business sector, that have resisted first contract because they were certified on a 45:55 split as opposed to a balance the other way? I would like to have that information because it may be of some importance. Can we get it?

Mr. Chairman: I do not understand the request myself.

Ms. Madisso: Can you say that again?

Mr. Callahan: Maybe it is not on record, I do not know, but I would like to know, particularly in the small business area, if there is any way of getting statistics as to what small businesses have resisted first-contract legislation where the certification process was on the basis of a 45:55 per cent split. I would like to find out whether there is any reinforcement for what is being said here.

Mr. Taylor: Maybe I could clarify that. In my mind, I think what you are getting at is the number of cases where union recognition is being contested. Is that it? From what you have said--

Mr. Callahan: Not necessarily where it is being contested.

Mr. Taylor: First, we do not have first-contract legislation spelled out here in Ontario.

Mr. Chairman: A first agreement.

Mr. Callahan: A first collective agreement where it has been resisted wildly or fiercely.

Mr. Gray: I hate to be pessimistic on this issue, but our experience in dealing with the Ontario Labour Relations Board is such that you can get virtually no statistical information from it. You can get gross figures of how many hearings it has had in a given year, but when it comes down to firm size or sector and into our kinds of constituents, how many it has heard, how many have succeeded on such a basis, how many have been rejected on another basis, we have tried to go after that information without any success.

This is broader than the current debate, but I encourage you, if you have any opportunity to make such recommendations, to have the OLRB and the Ministry of Labour start to develop much more rigorous and useful statistics, so policymakers can understand these questions before they barge ahead. This is partly what we are saying. Let us be cautious about these things, and determine that because we may have had some abuses at a large firm level, we broad-brush it and apply some standards that may be appropriate to a large firm and its resources across the mosaic to affect a great many firms that simply do not have the resources to deal with it.

Mr. Chairman: Mr. Callahan, I wonder if after we have adjourned you can sit down with Ms. Madisso--

Mr. Callahan: And explain to her what I am saying.

Mr. Chairman: --and work out a request that we can put to either the OLRB or the Ministry of Labour.

Mr. Callahan: Okay. My second point is that you suggested, as did the Ontario Mining Association, in regard to the discretion that is granted to the board where there is an application for decertification and for certification by another trade union that the board be required to hear them first and if they grant the application, that all other applications, including one for arbitration, be discussed. Is that what you are saying?

Mrs. Andrew: Yes.

Mr. Callahan: If that is the case, let us say the employees were successful in obtaining a declaration that a particular trade union had

presumably gone through some of the motions of trying to negotiate a collective agreement, had failed and had wound up in arbitration. Why should they be sent back to square one? Why should they not be entitled to the arbitration process even though there has been decertification of the trade union? Why would one send them back to square one?

Mrs. Andrew: If the arbitration process is a last-ditch effort and that union really does not enjoy the full support of the employees, as evidenced by their application for decertification, and if you accept that the employees' wishes are paramount in all this, then it seems the only way to go is to allow the employees' application to be heard first.

Mr. Callahan: If they simply decided that they had lost confidence in that union and that was the reason for successfully obtaining a declaration that it no longer represented the bargaining group, why should that put them back to square one to go and find someone else who would take their cause forward to arbitration? Why not let arbitration proceed and a decision be made?

Obviously, there has been a lot of cost spent up to that point by both parties, by the employer and the employees. One would think at that point there should be a determination in place.

Mr. Gray: You are suggesting that in all cases you go back to a situation where there was a union representing those employees. It may not result in that. The decertification--

Mr. Taylor: You hope it will not. You have a new bargaining agent, so you can negotiate a settlement rather than go to arbitration, would you not think?

Mr. Callahan: Certainly, if one looks at the evil that this legislation is to address that would be like sending them back to go through the feverish activities of the past, as was represented by some of the examples we have heard, where there have been difficulties in first-contract legislation, sending them back to the labour unrest.

Mr. Gray: It would certainly ensure that the union, when signing up, gets proper certification and not one that is tenuous.

Ms. E. J. Smith: Just very briefly, because I get letters with this too, on clause (b), which is the most different of the clauses in subsection 40a(2), you refer to it on page 4 and you seem to conclude that the respondent is inevitably the employer. Yet many people talk about big unions taking advantage of small employee firms, in which case the respondent would be the union for unreasonable bargaining. We hear people coming in saying they are demanding salaries equal to those at General Motors in Oshawa in some little town up north, as an example of big union bullying. Clause (b) is equally applicable to each side; yet on page 4 you seem to assume that the total thing is addressed to bullying employers.

Mrs. Andrew: I think in the majority of cases, the respondent would be the employer, but you are quite correct that the respondent could be the employee. The cases that are cited as the reason for this law are of that nature and there is no reason to think that--

Ms. E. J. Smith: The union is not generally speaking the bully.

Mrs. Andrew: It may be, but as you say, if a large union is trying

to bully a small employer, the small employer is in the position of deciding whether he can negotiate a reasonable settlement that the firm can survive or whether he can trust an arbitrator to come up with something. It really is a catch-22 decision.

Mr. Gray: You are a little bit between a rock and a hard place. You stake out your firm's stance because this is economic reality. If you fail, the risk for you as a firm owner is loss of all your personal savings, bankruptcy of the business, loss of all the jobs in it and, add insult to injury, employers are not permitted to have UI; so you are out on--

Ms. E. J. Smith: You are assuming your arbitrator is not fair.

Mr. Gray: What I am saying is, generally speaking, a small employer is not going to resort, first of all, to bad-faith bargaining. He cannot afford even to bother with that stuff. Second, he is not going to risk going to an arbitrator because he is afraid that if he does so, then he will have imposed upon him, given the breadth of the arbitrator's--

Ms. E. J. Smith: Is that an unreasonable fear that we are addressing? Maybe they ought to be going to arbitration frequently if their fears are in any way correct.

Mr. Gray: With regard to arbitrators, from my experience with other labour and different types of tribunals, it is fine for you folks here to talk about the intent of the legislation and what you see the permissive or unpermissive nature would be, but I am not so sure arbitrators always look back to how the intent of the legislation was drafted and what the discussions were here before they start to impose their will on a given settlement.

Ms. E. J. Smith: Do not forget you are selecting the arbitrators in this.

12:50 p.m.

Mr. Gray: That is right, but as was pointed out by the previous testifiers, in this province we do not have all that many qualified arbitrators who are used to doing these kinds of things. Those who are experienced come at a large dollar and, second, a lot of it has to do with public sector bargaining, which is quite different from what we are talking about here.

Mrs. Andrew: Very few would be sensitized to the economic realities in a small firm. They would simply look to what similar employees were being paid in a large firm and suggest that as a reasonable solution.

Ms. E. J. Smith: The world must be full of people who would be reasonable and logical arbitrators for small business because I think everybody is very sensitive to the importance and need of small business.

Mr. Gray: I wish I could share that confidence.

Mrs. Andrew: Even the employer nominees at the board itself are drawn largely from the large firm sector and not very many of them would have small business background.

Ms. E. J. Smith: Maybe we should change that.

Mrs. Andrew: Possibly, yes.

Mr. D. R. Cooke: I am interested in the survey you did. This was a survey that went out with your newsletter?

Mrs. Andrew: Yes, that is correct.

Mr. D. R. Cooke: You had about a 25 per cent return?

Mrs. Andrew: That particular survey is fairly complicated. Our response was 14,000 responses, more than 7,000 of which were in Ontario. Those are very rough figures. That was approximate. I have a copy of the full report if you would like it.

Ms. E. J. Smith: What percentage? You went to numbers rather than percentages?

Mr. Gray: We had 14,000 responses, of which 7,000 were in the province.

Ms. E. J. Smith: What percentage of the things mailed out was the question.

Mr. Gray: The Ontario responses alone would be about 10 per cent of the mailing.

Mr. D. R. Cooke: Ten per cent of the mailing is quite significant. I guess the way I perceive it, actually more than 40 per cent of those small businesses said they would like to see mandatory first-contract legislation. Is 41 per cent right?

Mrs. Andrew: Yes, and it is audited.

Mr. D. R. Cooke: The next comment you made was that a fair number of small businesses do not have very much information on which to come to their decisions and they may be unsophisticated decisions. Do you put the comments in both categories? Both those who want it and those who do not want it have unsophisticated decisions? Did you do any research to determine why those that want first-contract legislation want it?

Mr. Gray: In the mandate itself, and often in conjunction with the Ministry of Labour in this situation, or if it is a question on banking or something of that nature, we present arguments for and against. We do our very best in contacting the people who are drafters of the given piece of legislation to ensure that the arguments are fully balanced, not only in terms of the argumentation, but even down to how many lines we use. They are presented with arguments for and against. One can only presume that the argumentation for first-contract arbitration, as presented to the members, was a convincing argument. We do not have any information beyond that.

Ms. E. J. Smith: Maybe we could see that question.

Mr. Chairman: Yes, it would be interesting. Thank you, Mr. Cooke. I have a question of you on the appendix concerning the imposition of first collective agreements. We are talking about Newfoundland which recently enacted one. You talk about a three-year, five-year, seven-year and 11-year period in different jurisdictions. Not very many referred to the tribunal for imposition of a first contract. It was a very small number, given the number

of years that are involved. If you look at Quebec, there is an amazing difference in the number of referred. Do you know why that is? Is there something in that legislation that would lead to more being referred to the tribunal?

Mr. Gray: It would only be speculation and not necessarily bring anything to bear. Certainly, Mr. Mackenzie would support that there is a great intensity of competition amongst labour unions in Quebec. That may mean there are more efforts to certify throughout the province on a firm-by-firm basis. I do not know that, though.

Mr. Chairman: We will be looking at the other jurisdictions in the legislation when we come to the clause-by-clause debate in a couple of weeks.

Mrs. Andrew: If we can provide any further comment on that, we certainly will.

Mr. Taylor: I want to compliment the person presenting the brief. I do not often do it, but I admire the forthrightness and honesty in your presentation. You see the rationale for the legislation and project some of the results. I just want to express my appreciation for that.

Mr. Chairman: Thank you, Mr. Taylor. Thank you both for the presentation. You can tell the committee enjoyed it and got something out of it.

The committee recessed at 12:57 p.m.

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STANDING COMMITTEE ON RESOURCES DEVELOPMENT

LABOUR RELATIONS AMENDMENT ACT

WEDNESDAY, APRIL 2, 1986

Afternoon Sitting

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Madisso, M., Research Officer, Legislative Research Service

Witnesses:

From the Communications and Electrical Workers of Canada:

Watt, M., National Representative

From the Ontario Public Service Employees Union:

Usner, S., Co-ordinator, Education and Campaigns

Onyschuk, J., Research Education Officer

From the Ontario Chamber of Commerce:

Gray, D., Chairman, Employer-Employee Relations Committee

From the Ministry of Labour:

Failes, M., Policy Analyst, Labour Policy and Programs

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Wednesday, April 2, 1986

The committee resumed at 2:12 p.m. in room 228.

LABOUR RELATIONS AMENDMENT ACT
(continued)

Consideration of Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: The committee will come to order. We have the Communications and Electrical Workers of Canada. Morris Watt is with us. Mr. Watt, have a seat at the table. As I understand it, a week ago you did not know you were going to be doing this. Nevertheless, we appreciate the fact that you are here.

COMMUNICATIONS AND ELECTRICAL WORKERS OF CANADA

Mr. Watt: As a matter of fact, I did not know yesterday.

My name is Morris Watt and I am the national representative for the Communications and Electrical Workers of Canada. I will read the brief to you.

Our union began hearings in the federal jurisdiction on March 17, 1986, to defend our unit at Graham Cable TV-FM. The weakness and vagueness of federal first-contract laws have become clear to us during the 18 months of the Graham Cable process. It is to avoid such betrayals of the spirit of free collective bargaining that we submit our brief today.

At Graham Cable, the employer has made a mockery of Canadian labour laws by blocking all our efforts to reach a first agreement. This battle has drained our organization's staff resources, preoccupied our legal advisers and broken the hearts of some decent, honest workers.

The decision of workers at Graham Cable to band together collectively has been frustrated, and they may even lose their representation totally if the decertification succeeds. In any case, the legal right of the employer to stonewall the collective bargaining process has sown bitterness, division and confusion among the employees. They took seriously the claim that workers in this country have a right to associate freely and to bargain collectively. They have been betrayed.

At meeting after meeting with management lawyers, at hearings and press conferences, the workers are called on to declare their faith in principles, which the employer ignores. After 18 months, they are scarred and so is their union. This cynical ritual must stop. In the federal jurisdiction, there is a law on first contracts, but unions such as ours cannot get protection under that law because of a series of technical obstacles.

The main difficulty is the test of bad faith which is applied both by the minister and then by the board if the minister refers a case to it. Our position is that when bargaining reaches an impasse, the imposition of an arbitrated first agreement should be automatic. In this way, the discretion of the minister and the board will be limited, as will the bitterness between the union and the employer.

It is notoriously difficult to prove bad faith and a drawn-out, sordid process to attempt. With the bad-faith test, we have a situation where the federal government's declaration that workers have the right to a union is operative only on paper. On the ground, we know this right can be denied when an employer is really determined to remain nonunion.

When the federal law was first introduced in 1978, there were 230 applications for certification, of which 171 succeeded. Only five of these resulted in applications for arbitration of a first contract, and all five were granted. Some of us began to think first-contract legislation could work, but then employers began to compare notes on ways of circumventing the law. The next year, there were six requests for first-contract arbitration, but none was granted. Unions are not stupid. We now rarely waste our time on such requests. Despite the recent favourable decision on the Canadian Imperial Bank of Commerce Visa strike, the pattern of obstacles remains formidable and should not be replicated at the provincial level.

We need effective first-contract legislation in Ontario, not the watered-down version we have already encountered at the federal level.

At Super Plastics Corp. Ltd., we face a similar situation. A group of workers, mostly South Asian immigrants, has been on strike now for eight months. Many of them have an uncertain status in the country, working with job letters while decisions are made on their claim for refugee status. Their insecurity in Canada is reinforced by insecurity on the job. Their access to union protection has been stymied by an obstinate employer. They have problems which cry out for union representation--with dust, fumes and unguarded machinery and arbitrary exercise of management rights. What image of Canada are these new Canadians developing?

From these two cases, it should be clear that the Communications and Electrical workers of Canada has experienced the need for proper first-contract laws in its daily work. Our case for revising the labour legislation in this province is not based on abstract labour demands but on the pain and anger of our members.

Ours is a union which organizes. We have grown tenfold since our founding in 1972. Unless the laws change, we will have more experiences such as those of Graham Cable and Super Plastics. We cannot maintain ourselves as a progressive and responsible force in labour relations while the legal cards are so blatantly stacked against us.

In our view, Ontario labour laws should promote the collective, enlightened self-interest of workers--collective more than individual. There are other laws, particularly human rights laws, which deal with individual injustices on the job.

Enlightened rather than narrow, unions such as ours are a social movement and not just a self-defence team. If government wants to act responsibly, then laws must be in place which give us responsibility, or at least allow us a fair chance to achieve a position of responsibility.

There is self-interest rather than an abstract common good. The overwhelming weight of provincial law is in support of property rights rather than workers' rights; yet a democracy requires some channel for workers and their organizations to assert their own needs and their own legitimacy. When a union is certified, it must be able to achieve a first agreement rapidly. We

do not apologize for seeking this balance to management power. In recent years, the balance of power between employers and unions has tilted. To restore some relative equality at the negotiating table requires new initiatives such as first-contract legislation.

Why have unions lost this ground? We see four structural changes that have contributed.

1. New technologies: As computers and other production technologies enter Ontario work places, they shift more and more information into management hands. In the information age, information is power. We have experienced job loss, deskilling, increased stress, increased surveillance and increased centralization of decision-making as a result. This is not intrinsic to the technologies themselves, but rather reflects the way they are being applied. At present, they strengthen management's hand and weaken ours.

2:20 p.m.

2. Demographic shifts: More women are entering the labour force and many of them on a part-time basis. Since women are still paid so much less than men--62 cents for every dollar earned by a man--employers use them to push down labour costs. Until the systemic discrimination against women, immigrants and the handicapped is overcome, their entry into the labour force gives management a new tool to divide and conquer the work force. While our union and others work to overcome such injustices, as long as they remain, they are a powerful tool to strengthen employers and weaken unions.

3. Shifts in the economic base: Our province's economy is based on natural resources in the north and branch-plant manufacturing in the south. Both are under attack in the new international division of labour. The current federal push for free trade with the United States is one more incident in this longer-term process. As stable, high-wage jobs migrate out of the country, the economic and social leverage of the unions in these sectors is eroded. The gains of transnational corporations are at the expense of Ontario workers and the unions which represent them, unions such as ours.

4. Imported union-busting: South of the border, it is socially and politically respectable to bust unions. From right-to-work laws to Sun Belt deals to attract capital at the expense of labour standards, the climate for workers and their unions has deteriorated significantly during the past generation. All too often, branch plants of American corporations bring their head office attitudes with them, and the influence of American publications, consultants and professionals on their Canadian counterparts is frequently anti-union. These are the attitudes we face across the bargaining table when we undertake first-contract negotiations. We need a clear message from our governments that union-busting is as unacceptable here as a privatized medical care system.

With these four trends working against us, some might think unions in Ontario are on the run. We wish to make clear the opposite is true. We are equipping ourselves to work with our members and with unorganized workers to ensure the transition to an information age in Ontario is a democratic one and to ensure people's work becomes more varied and interesting and their leisure more extensive and fulfilling. We are addressing governments in briefs such as this to reaffirm our commitment to decent and fair labour standards.

Without good first-contract legislation, responsible employers will still bargain fairly, but those employees who most desperately need union representation will continue to be denied it. The most reactionary and self-serving managers are rewarded by the present system of first-contract bargaining, not the responsible and forward-looking. The labour movement is united in its desire for change. Is it not time for government to move? Thank you.

Mr. Chairman: Thank you, Mr. Watt. There is a very broad but clear philosophical message in your brief. There was an indication Mr. South had a question.

Mr. South: Do you always deal with the federal government? In the first instance you gave in regard to Graham Cable, you were dealing with the federal government. Do you always deal with it?

Mr. Watt: Until January 1984, most of it was with the federal government, but since 1984 we have been dealing with provincial governments also.

Mr. South: What is the size of your union?

Mr. Watt: We represent approximately 40,000 members in Canada.

Mr. South: Would they be mostly in Toronto, mostly in Ontario?

Mr. Watt: No, it is across Canada. We represent about 30,000 in Ontario and Quebec.

Mr. South: We had a gentleman in this morning presenting the point of view of small business in the Hamilton area. One of his concerns was that the legislation we are talking about concerns itself mostly with the bad problems created by big companies and also maybe big unions. His feeling was that he represented small businesses and they were at a very unfair disadvantage when they had to deal with big unions, because a big union has resources he does not have as a small businessman. It has lawyers, administrators and staff people it could put on this all the time. Again, trying to put you, your union and your problem in perspective, do you have full-time lawyers on your staff?

Mr. Watt: No. We do not use lawyers to negotiate collective agreements, if that is what you are asking me. We have lawyers on retainer fees, but we have no lawyers as staff as such.

Mr. South: The point he was making was that maybe we should restrict this bill only to big business and big unions, that we should try to find some way of looking at his concerns. You say you get intimidated when you deal with big business. In the same way, you have to recognize that he feels the same way. He is a small businessman and he has to run every day just to keep his business going and make a profit. He does not have time to sit down and enter into some of these involved discussions you get into with big industry. How would you feel if we ended up with a bill that would look after big business and big unions only?

Mr. Watt: I remind you that out in the marketplace the majority of the big businesses today are organized.

Mr. South: Yes.

Mr. Watt: The small businesses are left.

Mr. South: How big is Graham Cable TV-FM, for instance?

Mr. Watt: Graham Cable represents approximately 60 employees.

Mr. South: Is that here in Toronto?

Mr. Watt: Yes. It is in Toronto. It is under federal jurisdiction.

Mr. South: Yes, right.

Mr. Watt: The one under provincial jurisdiction with which we are concerned is Super Plastics.

Mr. South: How big is it?

Mr. Watt: That could represent approximately 100 workers.

Mr. South: Do you appreciate his problem? Do you see his point of view as a small businessman? With a small company, he has limited resources at his disposal when he starts to deal with a big union. You have to admit that a union with a membership of 40,000 is pretty big and powerful when dealing with an industry or business of 10 or 20 employees. Would you recognize that? What would you think about the idea of having a bill that concerned itself only with big business? Now we have to define big business.

Mr. Watt: I do not think I would be in a position today, sir, to give you a definite answer on that one. When we look at legislation and a first agreement, we look at the total and not at the size of the industry.

Mr. Mackenzie: Is it not correct that what you are dealing with in the two examples you gave us, as with a number of other examples we have been given, is with small employers essentially in both cases? Mr. South should note that.

Mr. Watt: Yes.

Mr. Mackenzie: The argument as to whether you can carve off just big businesses as against small businesses is just a horseshit argument. I wonder that we keep getting it at these hearings. It is similar to saying they do not have the right to organize anything fewer than 100 workers or some such argument. I have never heard anything so ridiculous in all my life.

In the examples you cited, I take it that you have gone through lengthy hearings that can qualify as bargaining to defeat bad-faith bargaining, and yet you are getting nowhere in terms of trying to settle the contracts.

Mr. Watt: That is correct.

Mr. Mackenzie: These are both first-contract agreements with which you are dealing.

Mr. Watt: Yes. That is correct.

Mr. Mackenzie: Since the merger your union would also deal with other than just government, whether federal or provincial employees, would it not?

Mr. Watt: That is correct.

Mr. Mackenzie: A number of small plants?

Mr. Watt: That is correct. In the industrial sector in Ontario, we represent 35 different locals and we have approximately the same in Quebec. Most of these are small companies.

2:30 p.m.

Mr. Mackenzie: Essentially, other than some of the communications divisions themselves, they are likely to be small units.

Mr. Watt: That is correct. They are all small units of fewer than 100.

Mr. Mackenzie: Thank you very much, gentlemen. Just before we leave it, I also appreciate your brief because there is no question it deals with an overview. This argument of the redress of the balance of power is one that some have tried to flog before this committee. The four points you have outlined, while a broad overview, are very effectively done. We have had a few examples, which I am sure people on this committee remember, that show us how close to the jungle we still are in labour relations in Ontario.

Mr. Callahan: I was going to address a federal matter, but I just want to get a handle on it. In the federal first-contract legislation, do I understand you to say they still use the bad-faith test and it requires the minister to refer a matter to the board for a test on whether bad faith has been involved in the negotiation?

Mr. Watt: I wish I were able to answer your question, but I cannot. I am not too familiar with the federal aspect of it. I am provincial.

Mr. Callahan: This brief gives me that impression. It says: "The main difficulty is the test of bad faith which is applied, both by the minister and then by the board if he refers a case for referral. Our position is that when bargaining reaches an impasse, the imposition of an arbitrated first agreement should be automatic. In this way, the discretion of the minister and the board will be limited, but so will the bitterness between the union and the employer."

I gather from that--and you cannot help us--that is the deal. Can anyone help us? Is that how it works federally?

Ms. Madisso: I am getting the legislation but I do not know yet.

Mr. Callahan: We are getting it, so I will get my answer then. Even though you have not addressed it in a specific way, although whoever prepared this brief has done so laterally, I gather you want automatic access to arbitration rather than some preconditioned requirement, something that may be less than bad faith.

Mr. Watt: Yes.

Mr. Mackenzie: For Mr. Callahan's information, it should be pointed out that this has been done by the union, the director and the research people. Mr. Watt was only informed recently that he was going to be delivering it.

Mr. Watt: That is right.

Mr. Callahan: I appreciate that. That is fine. We will wait and see what Canada has in effect.

Mr. Chairman: Have you been involved in any first-contract disputes in Quebec?

Mr. Watt: No, sir, none.

Mr. Chairman: You are strictly in Ontario.

Mr. Watt: Yes.

Mr. Chairman: Are there any other questions or comments for Mr. Watt?

Thank you very much for coming before the committee. Your brief was not long but it gave a very broad brush and the committee appreciates it.

Mr. Watt: Thank you, sir. Good day.

Mr. Chairman: The next presenters, from the Ontario Public Service Employees Union, are not here yet. It is only 2:35 p.m. Let us adjourn until 2:50 p.m. when they will probably be here.

Mr. Brandt: I think that is a good idea.

The committee recessed at 2:35 p.m.

2:58 p.m.

Mr. Chairman: We will come to order. We have with us the Ontario Public Service Employees Union, in the persons of Sean Usher and Jim Onyschuk. We welcome you, gentlemen, and look forward to hearing your views.

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

Mr. Usher: Thank you. I would like to say at the outset that I am presenting this brief on behalf of our president, James Clancy, and that Jim Onyschuk has done most of the background research for today's presentation.

We would like to thank the standing committee on resources development for hearing our submission on Bill 65. The bill provides for what is called first-contract arbitration. The Ontario Public Service Employees Union bargaining units cover 96,000 workers and are made up of 73,000 signed-up members who are covered by three different pieces of labour relations legislation. The largest group in the Ontario public service numbers over 9,500 members and comes under the Crown Employees Collective Bargaining Act.

We also represent 11,000 members--and this sector of our union is growing in numbers--who are covered by the Ontario Labour Relations Act. These are groups that are primarily funded by the Ontario government and range from units of ambulance attendants to the Art Gallery of Ontario.

OPSEU has some serious concerns with what this bill is supposed to resolve. While our experience is not as great as that of our industrial and union counterparts on first-contract strikes, we have had some costly strikes that might not have occurred had there been a first-contract arbitration provision in the act.

A classic strike which affected our members was that of the Art Gallery of Ontario. Here we encountered an employer who was determined to keep the union out. We ended up charging the employer with unfair labour practices and won our case. Had there been a first-contract arbitration provision, we feel certain this strike would not have been necessary.

We are all familiar with other bitter strikes such as those at Artistic Woodworking, Radio Shack, Fleck Manufacturing and Dylex, among others. Would these battles have occurred had there been a provision for first-contract arbitration? On that, we can only speculate.

At first, unions opposed first-contract arbitration. With some reluctance, unions now are beginning to see some benefit to an imposed settlement, especially in situations where an employer is determined to use a strike to defeat low-paid workers and their union.

We welcome this piece of legislation with certain reservations. We would prefer that there be no need for such an act. We would prefer that all collective agreements were freely negotiated. A freely negotiated agreement means a great deal more than a legislated or arbitrated agreement. In fact, OPSEU has long fought to be free of certain legislative yokes which have limited our bargaining rights for those members in the Ontario public service. However, we recognize that the parties to a first collective agreement are by no means equal in power. This act goes a little way towards addressing the imbalance in power between management and labour.

The reason for this act is somehow to compel a hard-nosed employer to bargain with a legally certified union. Such an employer will set out to break the will of a worker to have a union by forcing a strike. While the employer may suffer some hardships, he will not suffer the tremendous hardship a worker earning \$5 or \$6 an hour will suffer. In no way is it an equal contest.

In these circumstances, the union is not prepared to abandon its striking workers. It simply cannot allow its members to fight on alone. Instead, it must pour valuable resources into what generally becomes a prolonged strike which may inconvenience the community.

It is the employers who have the real power. They have the power to force a legally recognized bargaining unit to strike. With some degree of impunity, they can ignore a legally certified bargaining unit. Legislation gives the union side some limited means of redress. Even when a union wins a strike, the employer still has the power. The only difference is that the employer has been forced to reach an accommodation with the union on certain issues. Its powers have been partially limited.

It is a fiction that labour legislation puts the parties on an equal adversarial footing. As long as the employer is allowed arbitrarily to exercise its residual rights, it can put into place changes not covered or anticipated in a collective agreement. This is power. The only power the union is left with is to try to negotiate changes to what the employer has implemented, and then the union is limited to when it can start this process.

The employer side will argue that this procedure of first-contract arbitration is a threat to a system of free collective bargaining. They are right. However, the current system allows employers too much power. This act will compel an anti-union employer to do some serious bargaining.

In his book, *Reconcilable Differences*, Paul Weiler describes a typical situation that unions have faced, which illustrates why first-contract arbitration is necessary. He writes:

"Let me tell a different first-contract story, one which has been experienced by any labour board. The union has organized and been certified against the continued opposition of the employer. In this hostile environment, its position is tenuous and the employer senses that.

"The immediate employer tactic is to drag out negotiations, to talk only about the language and the structure of the agreement, and to refuse to put any monetary offer on the table until all of these details are settled (and these details the bulk of the employees find quite uninspiring). Meanwhile, members of management hint to the employees that they could get a substantial pay increase if only there were no union holding it up in the search for a collective agreement. The employees may become even more disenchanted when nothing is happening at their bargaining table, but other nonunion employees of their employer are granted generous wage increases at the regular time.

"As I stated, in order to try to break that deadlock, the union must get a strike mandate, either to brandish at the table or actually to use. Given the natural turnover in the unit and the waning employee interest, this may be a bit of an effort. Often the employer tries to help the process along by looking for excuses to weed out union sympathizers through terminations and transfers of dubious legality, and then by careful screening in hiring replacements.

"If, in fact, these tactics have worked and the union can get no strike mandate, the employer can safely exercise its legal right at the bargaining table to refuse to make any contract offer which a self-respecting union could accept. The employer just waits the union out until the decertification petition becomes timely. In effect, the employer may have lost a few skirmishes along the way, but eventually it has won the war against collective bargaining for its employees."

It is this typical situation that Bill 65 will, we hope, prevent. The act, if properly worded, may partially address the imbalance in labour relations power, especially for fledgling bargaining units.

Our major concerns are with subsections 40a(2) and 40a(15). We will focus our comments on these two subsections later.

How first-contract arbitration is supposed to work: Paul Weiler writes at length on how similar legislation was enacted in British Columbia.

"We came up with a device designed specifically for this type of dispute: 'first-contract arbitration.' When the parties get locked into such a confrontation, when they both appear to have dug themselves into a pit from which they cannot extricate themselves, the labour board is given the legal authority to impose the terms of a binding collective agreement which will end the dispute and stabilize the situation for a period...."

He goes on: "The immediate purpose is to put an end to the current dispute. That result, this provision does achieve very effectively. Probably that is a sufficient justification for it. We are talking about the type of labour dispute which has often deteriorated into an emotional and messy confrontation, in which the parties not only are inflicting disproportionate

harm on each other, totally out of line with the negotiating issues which divide them, but their willingness to escalate the dispute is drawing others into the melee--sympathizers, the police and public authorities, or third-party employers. First-contract arbitration is a sharp surgical instrument for lancing those running sores in the body of industrial relations...."

He goes on: "We were careful to hedge first-contract arbitration about with a number of restrictions: the procedure was available for only the first contract; the length of the contract could be for a maximum of only one year; referral from the Minister of Labour was required before the labour board could act (in order that the minister, who had access to the mediators in his department, could screen out any but the most serious cases for which the remedy was truly designed).

"In the first couple of decisions issued by the British Columbia board under this section 70, we elaborated on the rationale of the legislative provision in order to make clear that the labour board could use the procedure only in the truly exceptional cases, such as those depicted above. And in fact, over the first five years of its existence, the board actually used that power to impose a first contract on an average of less than twice a year.

3:10 p.m.

"But when we did write agreements against an anti-union employer, we made the compensation package rather generous. We stated quite forthrightly that that was what we were doing, in order to provide a disincentive to other employers adopting the kinds of tactics which would get them before the labour board. There is no doubt in my mind about the impact of that policy. First-contract confrontations died out in the provincial jurisdiction in British Columbia. We did not experience the long, agonizing battles which have erupted in Ontario in the last few years....

"The mediators quickly got the message across that the parties (especially the employer) had better accept the reality of collective bargaining, had better engage in serious negotiations with the union, and be prepared to reach a decent compromise settlement. Otherwise the labour board would be invited in to write a contract that they would not find too palatable (and good management lawyers, who dislike that kind of confrontation as much as anyone, were able to echo those same thoughts and persuade their clients to do the same thing)."

In a nutshell, first-contract arbitration is a system that can compel an anti-union employer to do some serious negotiating as opposed to trying to break a union.

Where first-agreement arbitration exists: There are four jurisdictions where first-agreement arbitration exists. They are the federal jurisdiction, British Columbia, Manitoba and Quebec. Section 171.1 of the Canada Labour Code establishes that the Minister of Labour is given the discretion to direct the Canada Labour Relations Board to inquire into a first-agreement dispute. The board, if it considers it advisable, may settle the terms and conditions of the first collective agreement. The board may take into account the existence of bad-faith bargaining. Any imposed collective agreement shall be for a period of one year.

The British Columbia Labour Code, sections 70, 71 and 72 are almost identical.

The Manitoba Labour Relations Act, section 75.1, is an amalgam of the other two approaches. The major items are that either party may apply to the Labour Relations Board to impose an agreement after certain preconditions are met, including the appointment of a conciliation officer. Upon such an application, the board has the option of proceeding directly to impose an agreement, or refer the matter back to the parties for a further 30 days. Should negotiations be unsuccessful after referral, the board must impose an agreement within a further 30-day period. The board must accept without amendment provisions agreed to in writing by the parties in imposing an agreement. Other terms that are fair and reasonable will be arrived at by the board taking into account evidence and representations submitted by both parties, comparative industry data and other matters the board considers of assistance. The agreement shall be for a one-year term commencing on the date the board settles the provisions.

The Quebec Labour Code, sections 93.1 to 93.9 provides that in a first-agreement dispute, where conciliation has not been successful an application may be made to the Minister of Labour. The dispute may be referred, by the minister, to an ad hoc council of arbitration. The council may impose a collective agreement according to the bargaining conduct of the parties. The arbitration award shall be for no more than two years.

What is significant in all other jurisdictions where there is first-contract arbitration is that accessibility is not based solely on a bad-faith test.

How has it worked?

In British Columbia, where the law has been in place for more than 10 years, its board received 34 applications. Twelve first contracts were imposed, 16 were voluntarily settled and six applications were rejected by the board. However, in most of the imposed contract situations there was no second contract forthcoming due to decertification. Weiler comments on this experience and draws some lessons.

"Our experience with first-contract arbitration has left me more than a little sceptical of that thesis. By and large, these collective bargaining relationships did not mature. The unions were decertified after the expiry of the contract which we had imposed. These bargaining units tended to be small, employee turnover was high, the union was not able to retain or rebuild its support, and the employer remained hostile throughout the entire experience. I now believe that special conditions are needed if first-contract arbitration is to be able to reserve long-range collective bargaining against the efforts of a recalcitrant employer. The unit must be fairly sizeable, the union must retain a solid core of supporters who can act as an inside unit committee, and there should be a two-year agreement in which to engage in visible administration of the contract (that is, grieving discharges, seniority cases, and the like) in order to demonstrate the value of collective bargaining in action. Only in this way will the union have the footing it needs to survive the expiry of the first contract, when it must negotiate a renewal on its own.

"Yet perhaps surprisingly, first-contract arbitration was a great success in its broader preventive impact. We imposed very few agreements. In those that we did, by and large the transplant did not take. Collective bargaining did not survive the recovery period."

We agree that the term of a first-contract arbitration must be for two years. This would allow the parties time to reach an accord.

In Manitoba, first-contract arbitration was enacted in 1982. Of 13 applications to the minister only five contracts were imposed. Voluntary agreements were reached in five of the cases. One was rejected, one was withdrawn and one was pending. Federally, similar legislation has been in place since 1978. So far, the federal board has imposed four first contracts and refused to impose four others. The board has not kept data on how many imposed first contracts survived after the one-year first agreement expired.

Quebec also has similar legislation. Of the 82 imposed contracts, more than half have been successfully renewed by collective bargaining. Two-year contracts are the norm in Quebec.

We can conclude that an important factor in the success or failure of an agreement seems to be related to the term length of the imposed contract.

Is subsection 40a(2) a bad-faith test for accessibility? The two key sections of this bill are subsections 40a(2) and 40a(15). Subsection 40a(2) has been characterized as a bad-faith test for accessibility. Subsection 40a(15) establishes the boundaries for an imposed agreement. The remaining sections deal with standard administrative details secondary to the above two sections. Subsection 40a(2) begins with:

"The board shall consider and make its decision on an application under subsection 1 within 30 days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where it appears to the board that collective bargaining has been frustrated because of...."

We have no quarrel with the 30-day time frame. We do, however, have some difficulty interpreting what the word "frustrated" means. This term can become the basis for questioning the right of a union to access this section. It could ironically become the basis to frustrate a union's attempts to apply this act. We recommend that this paragraph read:

"The board shall consider and make its decision on an application under subsection 1 within 30 days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where no first collective agreement has been effected by the parties, and;...."

This would comprise the first test; that is, is this a first agreement or not? Subsection 40a(2) continues with clause 40a(2)(a) which reads, "the refusal of the employer to recognize the bargaining authority of the trade union;...."

The labour board has repeatedly stated that the refusal of the employer to recognize the bargaining authority of the union is bad-faith bargaining. This is a standard recognition provision and forms the basis for good-faith bargaining. Does the employer recognize the bargaining agent or not? There is plenty of case law interpreting what does constitute recognition of a bargaining agent.

We would rewrite clause 40a(2)(a) to read, "the respondent has breached section 15; or...."

Clause 40a(2)(b) gives rise to interpretation problems that could deny accessibility to the act. It reads, "the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;...."

This is another clause that will allow the employer off the hook. The board will have great difficulty applying this test. How would one distinguish the difference between tough bargaining and being unreasonable? As long as the employer can offer a semblance of a reason for taking an uncompromising stand, this test would not apply. On a wage matter, all an employer would have to say to qualify as reasonable would be: "We do not have the funds to pay for an increase in wages, even though we would like to. Therefore, we are offering you nothing." How reasonable can one be? There is nothing empowering the board to force an employer to open its book to determine whether the employer was indeed being unreasonable. Word of mouth would qualify as reasonable in such a case.

The labour board has determined that when an employer imposes an uncompromising bargaining position without reasonable justification, it will be bargaining in bad faith. We would rewrite clause 40a(2)(b) to read, "the respondent has failed to adopt fair and reasonable bargaining positions; or...."

We have faith in the board's capabilities in this area. Let the board determine whether someone has failed to adopt a fair and reasonable position as opposed to having to determine whether someone has failed to give a reasonable justification.

Clauses 40a(2)(c) and (d) read:

"(c) the failure of the respondent to make reasonable efforts to conclude a collective agreement; or

(d) any other reason the board considers relevant."

Clause 40a(2)(c) is another standard test for bad-faith bargaining and would be redundant with our clause 40a(2)(a). We would rewrite this clause to read, "it appears to the board that the parties are unlikely to enter into a collective agreement within a reasonable period of time; or...."

Here the test the board would make would be to determine whether a reasonable time had elapsed and the respondent was not negotiating in a fair and reasonable way. We have no quarrel with clause 40a(2)(d). Our reading of clauses 40a(2)(a) to (d) indicates that one would have to prove that an employer had acted in bad faith before a fledgling bargaining unit had access to a first-contract arbitration. This disturbs us given our experience with the delays encountered over bad-faith cases.

Any time a union goes to the board to prove bad-faith bargaining, it may spend months, and in some cases years, before the labour board trying to prove its case while its members are out on strike. This situation is totally unacceptable. It benefits the employer who is trying to break a union, and frustrate workers who are trying to negotiate a collective agreement. If this legislation is designed to stop first-agreement strikes, it will fail to achieve this goal should the current wording remain.

We are proposing that bad-faith bargaining be but one basis for accessibility. We are also proposing that failure to adopt fair and reasonable positions, and when the parties are unlikely to enter into a collective agreement within a reasonable period of time, be the other grounds for accessibility.

The parties then are free to prove to the board that either bad-faith bargaining occurred, or failure to adopt a fair and reasonable position occurred, or that in all probability the parties will not enter into an agreement within a reasonable time. The board is certainly experienced enough to determine whether any of those three situations has occurred. This then forms the basis for accessibility.

When an employer has bargained in bad faith and breached any of clauses (a) through (c), a first contract shall be imposed. We question whether accessibility should be solely based on what, in effect, is a bad-faith test.

Our proposal is in line with our union counterparts. We, like them, propose an alternative that does not mean open accessibility, nor does it mean that the bad-faith test is the sole basis for accessibility. Ours is a proposal that provides for easier and legitimate accessibility.

We would like to refer you to the other jurisdictions that were mentioned on pages 7 and 8 of this brief. We have their experience, so the legislation here in Ontario should be an improvement on their legislation.

We agree with the United Steelworkers of America when they stated during their submission on February 27:

"The test should not be bad-faith bargaining. It should be something less than bad-faith bargaining. We prefer open access. We are not going to get open access. We understand that we are not going to get open access. We are not happy that we are not going to get open access, but we are realists and so we say, 'Give us something that is not the bad-faith-bargaining test and that is not open access. Give us something in the middle.'

"Our subsections (a), (b) and (c) are our attempt to get to the middle ground. This is a most reasonable position...and we cannot, for the life of us, understand why the Liberal Party and the honourable minister and his advisers and his deputy are trying to finesse the issue. We are not silly. We do not understand why they are trying to finesse the issue."

Subsection 40a(15): Is it enough? Subsection 40a(15) deals with the criteria to be taken into account by the tribunal that is arbitrating a first agreement. It reads:

"In arbitrating the settlement of a first collective agreement under this section, matters agreed to by the parties, in writing, shall be accepted without amendment and account may be taken of,

"(a) whether the parties have made reasonable efforts to reach a collective agreement;

"(b) the terms and conditions of employment, if any, negotiated through collective bargaining for employees performing the same or similar functions in the same or similar circumstances as the employees in the bargaining unit; and

"(c) such other matters as the board or board of arbitration considers relevant to a fair and reasonable settlement."

We agree with the first sentence of subsection 15. However, we question the phrase "and account may be taken of." Surely the Ontario Labour Relations Board is competent in assessing both parties' positions and rendering an award based on the evidence. Our recommendation is that this section should read: "In arbitrating the settlement of a first collective agreement under this section, matters agreed by the parties in writing shall be accepted without amendment and account may be taken of all matters as the board or board of arbitration considers relevant to fair and reasonable terms and conditions of employment under collective agreements."

The present wording of subsection 40a(15) would allow for the consideration of nonagreement wages and conditions. Our wording would allow the board to consider matters relevant to a fair and reasonable contract based on current collective agreements.

If this act is to work then, there must be some form of compulsion to force the anti-union employer to reconsider its hard line. An imposed settlement based on freely negotiated agreements will cause the employer to think twice about its actions. There is no greater inducement to force a hard-line employer to the bargaining table than knowing that an imposed settlement would reflect union-based rates, benefits and conditions. An employer knowing this would certainly try to negotiate something less than the negotiated settlements.

To compel an employer to negotiate an agreement with the union, the board must threaten the employer with better terms than he would have been forced to concede through bargaining. That is the lesson of Weiler.

How to stonewall a first agreement: An anti-union employer knows that time is on his side and he can use the process to his advantage.

Starting with the certification process, the employer can prolong the process by challenging the union through each step. It is normal for a certification to take four or five months from the time the worker signs a card to the date the union is legally certified. Only after that time does the bargaining commence.

3:30 p.m.

Bargaining may take another five or six months, depending on how fast the employer wishes to bargain. It is only after such a lengthy period that the worker has some idea of whether there is going to be an agreement or whether he or she will have to strike. With this act, should bad faith be the only test, the process can be further extended by six months or more. With our proposal, we limit this final stage to a reasonable time frame.

In conclusion, the proposed changes we make are not major ones. They do, however, allow for easier accessibility without having to prove bad-faith bargaining. We do not exclude bad faith as a test; it is simply one test. Should the current wording go through, the situation this bill was designed to resolve will be further frustrated. We ask this committee to consider that this government has created a good atmosphere for resolving problems and that this atmosphere continues. We ask that you make this legislation right in the first place, so we will not have to continue to do battle.

All this is respectfully submitted on behalf of the president of the Ontario Public Service Employees Union.

Mr. Chairman: Thank you, Mr. Usher. A number of committee members have indicated an interest in asking you some questions.

Mr. Callahan: I would like to go to page 15. First of all, I assume you view the wording that is now in the act proposed by the government as being simply bad faith. You do not view it as anything less than bad faith.

Mr. Usher: That is true.

Mr. Callahan: You would like to have open access, as would the United Steelworkers, but you realize, as the Steelworkers do, that is not likely to happen. You are proposing something very similar, if not almost identical, to what was proposed by the Steelworkers, to create something more than bad faith.

Mr. Usher: Correct.

Mr. Callahan: I presume your union would be content with a piece of legislation that contains access to arbitration that had as precedents to getting to arbitration something less than bad faith. You will have to bear with me--I am sure I am going to get guffaws from my colleagues--but if it turned out that in some way we could prove to you in a definitive way that the proposals outlined by the government in its bill, unchanged, constitute something less than bad faith, to me it follows that you would accept that. We have gone down the road. I have taken you to the brink.

Mr. Gillies: Do not jump.

Mr. Callahan: Obviously, that is the logical conclusion.

Mr. Onyschuk: What we would like to hear from you is what you are referring to as something less than bad faith.

Mr. Callahan: As I understand your brief and the briefs of many of the unions, they want automatic access. If they cannot have that, they do not want the bad-faith test, with which I think we are all in agreement, because the bad-faith test apparently did not work. You want something less than bad faith. I am saying to you that you people conclude that the provisions in the act as drafted now are just bad faith.

Mr. Onyschuk: That is true.

Mr. Callahan: If you were satisfied that the preconditions set out in the draft legislation, as now phrased or perhaps slightly amended, contained a test less than bad faith, you would be content with that, I gather.

Mr. Onyschuk: We would be content provided the board had something it could hang its hat on if there were clauses in there that would allow the employer to weasel out of its obligation to negotiate in good faith. The crux of this act, its design and purpose, is to force an employer to negotiate in good faith.

Mr. Callahan: I appreciate that, but as I read your brief, it seems to me that what you are saying is, "Bad faith, no, something less than bad faith, yes, if we cannot get automatic access." I am not trying to trick you.

I am just trying to get an answer, if that is your position.

Mr. Onyschuk: I believe our counterparts in the United Auto Workers indirectly addressed this matter yesterday, although I was not present. I understand they looked at what is termed "surface bargaining." If you are simply going through the steps without actually negotiating, but listening to the party and presenting a counterstatement, which is deemed to be surface bargaining, that could likewise qualify as something less than bad faith.

We certainly do not want something along those lines. We want them to negotiate in a serious manner. Section 15 of this act provides that there be some form of compulsion, which we agree with, to force the employer to consider seriously that where you have some tests that the board has great experience in determining whether they should apply, if these tests are proved, in a sense, the employer could be penalized for not negotiating when it could have negotiated a lesser agreement if it had chosen to negotiate in good faith.

Mr. Callahan: That is my next question. On page 15 you quote the United Steelworkers' statement of February 27, saying, "Give us something in the middle." If it is in the middle between bad faith and automatic access, you are happy with it. Is that right?

Mr. Onyschuk: What constitutes "in the middle"? We have qualified what we see as in the middle, and it coincides exactly with what the Steelworkers see as in the middle. These are all testable matters.

Mr. Callahan: This is Mr. Shell's amendment. That is because Mr. Shell, whom I respect, says that is the middle. If it turns out that what is here is in the middle, you would be agreeable to it, I gather.

Mr. Onyschuk: What is here as in the middle also coincides with what is here as in the middle in Manitoba. The Manitoba experience should be looked at very seriously by this committee. If mistakes were made in other jurisdictions and weaknesses were found in their legislation, then this committee should be duty-bound to improve upon them.

Mr. Callahan: One of the weaknesses in the Manitoba experience was the one year as opposed to the two years. That had been corrected in the bill.

Let me go on. I can understand your reluctance. The second point is on page 17 in your statement: "There is no greater inducement to force a hard-line employer to the bargaining table than knowing that an imposed settlement would reflect union-based rates, benefits and conditions."

I have asked this question of a couple of other witnesses with reference to the question of automatic access. The arbitrators might take that approach, but if automatic access was there, why would any union ever bother to try to negotiate an agreement collectively? I do not know whether that follows from that statement.

Mr. Onyschuk: Some arbitrators might and some might not. It depends upon the perspective of each arbitrator. The point is that what the unions are negotiating reflects trends. For instance, a board sees trends that have an easy test. It can be reasonable in looking at what these trends are and say, "Within reason, the high part of the trend is at \$12 an hour and the low part of the trend is at \$9 an hour, so we will give a middle." That is reasonable.

Everybody can read the signs. The data are available. Employers can read the signs and can determine whether they want to live with something between \$9 and \$12 an hour. Maybe \$10 an hour would be something they could negotiate. The matter being negotiated is not prolonged, it does not impose on the community and it does not cause hardship. The contract is negotiated by this means.

3:40 p.m.

Mr. Callahan: Without arbitration.

Mr. Onyschuk: Without arbitration. The point is that the current wording that we and the Steelworkers propose does provide something that is measurable. The parties can get an idea of what to expect if they go to an arbitrated settlement. They know roughly what to expect.

Mr. Callahan: In the final analysis, what you are looking for is the middle line between bad faith and open access.

Mr. Onyschuk: That is right.

Mr. Gillies: Without wanting to go over it word by word, I appreciate your efforts to come up with some suggestions in that middle ground. That could be potentially very helpful to us in terms of section 2, but I did not see it as explicitly stated in your brief as in some others that your preference is definitely for open access. Is that correct?

Mr. Onyschuk: Yes.

Mr. Gillies: I want to discuss a couple of things. I do not suppose for a minute that you endorse every word that you quoted from Professor Weiler, but one thing in here jumped out at me because I would have expected you to disagree with it violently. That is on page 9 where he is saying that: "Special conditions are needed if first-contract arbitration is to be able to reserve long-range collective bargaining. The unit must be fairly sizeable."

We have had a number of unions in before us pointing out that most of the employers will be trying to organize at this point. What they will be trying to bring to a first agreement will be smaller, and the bargaining units will be smaller. We had an employer representative in this morning who made a case for exempting small businesses from this act. I think most of us feel that would not be possible, but I wonder if you would comment on what Professor Weiler had to say about that.

Mr. Usher: I think he was referring to the conditions that currently exist and saying that the greater chance of success is with the larger units, etc., because of their staying power. We do not endorse that as a criterion. We are more than happy to endorse his suggestion of a two-year agreement because of the consequences, as we pointed out, where there is a two-year agreement situation in Quebec. There is a greater degree of success and, therefore, I think even Weiler would probably reassess that situation in the light of the two-year position.

Mr. Gillies: So you include that as an observation as opposed to a position. My feeling is that if the rest of the Labour Relations Act applies to any bargaining unit, no matter how small or large, it would be impossible to exempt any bargaining unit from this legislation.

I have one more question under section 15 as to whether the arbitrators should be comparing the case they have before them to other employers that are organized or not organized, or whether there is a collective agreement or not. You are quite definite that you feel the basis of comparison should only be with other organized employers. Why should the arbitrator not compare the case to all those other concerns, or a sample of those concerns that may be this employer's competition, regardless of whether they are organized? I have a problem with that one.

Mr. Usher: As labour people we believe that people should be organized and have the right to be organized and, therefore, these are the people who are the fairest comparative in that situation.

Mr. Gillies: Your feeling is that in such cases--and I am not saying it will happen very often--where the imposition of an agreement, based on comparison only with those organized companies, could be a definite economic hardship to a new company, the assumption is that the arbitrator would take that into account anyway.

Mr. Usher: The people who have decided to organize obviously are organizing because they want to be compared with other situations of employment under collective agreements. It is logical that is what they are aspiring to and what they want to negotiate towards.

Mr. Mackenzie: I want to go back for a moment to my colleague Mr. Callahan's favourite argument through all these hearings. He can correct me if I am wrong. As I understand it, he is saying that everybody recognizes we are not likely to get open access and wants something in between, and rather than changing the wording the government has given us in this current bill, some kind of a definitive judgement that says, "These words do not constitute bad faith," would satisfy what the union movement wants.

My difficulty with that--and I would like to know what further comments you have--is that you can get that definitive statement or judgement, but every damned case that goes to the board is different. I am not sure if it would hold out on any one of them, let alone individual circumstances or situations. I think you would just be putting another step in but going through exactly the same procedure.

However, if there could be a definitive statement from the board that these words are clearly meant--I am not sure what that means, mind you--to indicate this is less than bad-faith bargaining, do you see any way that kind of statement would work?

Mr. Onyschuk: We return to the question of what the exact wording would mean. You have to examine the wording in terms of whether it could be used as a means to frustrate the bargaining process further. That is where we have to be careful. There is wording out there that we have proposed and there are plenty of examples that can be applied. There is a lot of case law not only in Ontario but also in the rest of Canada, and much more case law in the United States that would assist us.

The board is made up of experienced people who refer to the various tests on a daily basis and have a rough idea of them. We have put in three basic tests, including bad faith. I am not saying bad faith should be thrown out the window. If you can prove bad faith has occurred, that should be a justification. We see the elements of surface bargaining as an element of bad faith.

We do have other tests, however, reasonable proposals. How reasonable is the employer? If the going rate is \$10 an hour, everybody in the industry is getting \$10 an hour and the employer is throwing in \$5 an hour, obviously that is very unreasonable. That does not take much judgement. If the employer is offering \$8.50, however, you are into a more difficult position in terms of interpreting whether that is reasonable. The criterion for reasonableness is based on what is out there in the field and what the current trends indicate.

Mr. Callahan: What does that come under? Clause 40a(2)(c), "the failure of the respondent to make reasonable efforts to conclude a collective agreement"?

Mr. Onyschuk: An effort to conclude a collective agreement is different from what the positions are in terms of the actual proposals put forth. In this case, an effort would be the surface bargaining we referred to. They are going through some motions to indicate: "Yes, we are bargaining with you. We met you on days one, two and three. We heard your position. We told you we do not have the dough." That constitutes an example of surface bargaining. With the current wording, a committee would say, "Yes, the employer was being reasonable." The request of the union is thereby denied on the basis that you have not proved they were being unreasonable in that example.

3:50 p.m.

If the position they took was: "We are offering you nothing. You have to accept our word that we have nothing in the account to pay," that would be a very unreasonable position. A board could look at that and say, "Yes, the party, the respondent, the employer has put forth an unreasonable position." It cuts the other way too. If the union was asking for \$15 an hour where \$10 was the norm and there was a downturn in the economy, obviously that likewise would be an unreasonable position.

Mr. Mackenzie: In other words, what you want to see is what the wording is going to actually say in the legislation, as we would in any union when we negotiate a union contract. If you get stuck with something--and that is the problem we have had with bad faith--you want to know what the avenue is and what we are dealing with in the way of actual wording.

Mr. Onyschuk: So long as the wording does not create problems. Remember, we are trying to solve problems, not create them.

Mr. Mackenzie: That is exactly the problem I have. There is a general recognition--some agree less than others, but it comes from more than just the union side--that the wording we have here is very likely the worst of both worlds. What we are looking for is not just some kind of statement of principle like the preamble of the Labour Relations Act, which has not meant very much to us; it is the actual wording that is going to be able to resolve this kind of situation.

I want to raise another matter with you. I am not sure how aware you are of the British Columbia situation. I was pleased that you put the Weiler comments into your brief. I may have mentioned to the committee before that I was out in British Columbia for my union, the United Steelworkers of America, at the time of one of the very first imposed contract settlements. I forget whether it involved a small machine shop or a cable plant--it may have been a cable plant--but it was in the lower mainland. However, I recall the vibes

that went through both the union and business communities as a result of that settlement, because it was a little better than probably would have been negotiated in the normal course of events.

While there have been many arguments over whether the BC experiment has been successful--based on figures, it does not look successful--the immediate reaction for the next couple of months that I was on this specific assignment was that there would be one hell of a lot fewer bitter first-contract confrontations and arbitrated settlements. That seemed to be the practice for quite some time thereafter. The impression, at least in the community--and this is something we cannot measure because we do not know--was that it had resulted in the parties sitting down and bargaining. That is one of the unknowns in the situation, but at the time it was widely seen as a result of what was either the first or second settlement that was imposed in British Columbia.

The two-year training period is necessary. One of the ways of overcoming the lack of accord that Weiler talked about is the educational programs that are going on. Are they more extensive now in your union than they have been in some time, whether they involve steward training, collective bargaining or safety and health matters?

Mr. Usher: Very much so. Mr. Onyschuk is responsible, by and large, for that total program, and the numbers attending are absolutely overwhelming. In fact, our next one-week course is more than doubly subscribed. That is a direct response to your comment in that regard. That is an important component. Weiler went on to say that the one-year imposition is less than desirable and that a two-year situation, as shown in the Quebec model, would tend to resolve that problem and would provide, as you have wisely counselled, the opportunity for that educational process to take place.

Mr. Mackenzie: I think it is a general practice. I attend a lot of them, and I have never seen the extent of schools, weekends and sometimes week-long courses in all aspects of union administration and collective bargaining that are going on. With the United Steelworkers of America, the United Auto Workers and the Canadian Union of Public Employees, there has been a substantial increase over anything they have ever done before. That is why I was wondering how your union fits into the picture.

Mr. Usher: There has been a vast increase. We have expanded the program to include two-week educational programs dealing with law, understanding the economy, political realities and political structures, including this process.

Mr. Mackenzie: Finally, do you really think there would be a misuse of the legislation were it to be totally open rather than having the access conditions that are set on it? The argument has been made by a number of unions that it should be given a totally open time frame. The obvious fear or counterside is that it would increase the chance of union organization or it would become the norm and there would be no more effective collective bargaining. What is your impression?

Mr. Onyschuk: Of course, we would prefer completely open access.

Mr. Mackenzie: Do you give any credibility to the arguments that are used against it, that it would do away with collective bargaining or lead to easier union organization?

Mr. Onyschuk: No. The board would determine whether the union was being reasonable in the circumstances, depending on the wording that is adopted. Again, some form of test would have to be applied. If it came to arbitration and you had the proposal, as we have on 15, obviously there would be some benefit for the union to apply constantly for this section of the act. However, it would also force the employer to do some serious bargaining in those kinds of circumstances. The easier the accessibility, the better it is in terms of redressing the imbalance of power that currently exists.

No union goes out to bankrupt an employer. Unions are very reasonable in the positions they take. We do not see any problem there. The board would be the final determinant as to whether accessibility would apply in the given circumstance.

Mr. Mackenzie: Most of the union presentations have made the argument that a contract you negotiate yourself is the best one. I presume that would be the view of the OPSEU as well.

Mr. Usher: There is no question about it. That is the driving force behind any union that has self-respect. They would much prefer to negotiate a contract tailored to their own people than to have one imposed. We are much more delighted, even in a continuing situation beyond one year, when we have a negotiated settlement than an imposed one.

Mr. Onyschuk: I can give one example, which you are probably familiar with. We recently had a community college strike, and the main issue they struck over was work load. The work load provision was initially an imposed provision. Year after year, the union was trying to fight to improve and change the wording of the clause that referred to work load. The employer took a hard line on it and finally forced the union to strike over that issue.

We are not totally enamoured with the idea of imposed settlements. You can sometimes lose an imposed settlement. An arbitrator or a board may go down the middle in some cases and render a clause that both parties are not too happy with. It is not automatic that you are going to get what you want through arbitration. A negotiated settlement is something that parties live with. They know they have to live with it.

Mr. D. R. Cooke: We very much appreciate your attempt to assist us in drafting this. I have a very quick question about clause 40a(2)(d), which you like as it is. Would you mind if we added the word "similar" so it would read "any other similar reason"?

Mr. Onyschuk: What would you see as being similar? What would it refer to?

Mr. D. R. Cooke: Similar to clauses (a) (b) and (c).

Mr. Onyschuk: Clauses (a) (b) and (c) are bad-faith tests; so in a sense you are simply referring to something similar to a bad-faith test. I would think we would have some question about that.

Mr. Gillies: For the sake of argument, suppose we adopted your position but left in (d) as a sort of basket clause, so that (a) (b) (c) were your provisions and (d) was the basket clause. What Mr. Cooke is getting at is just a change in clause (d) to make sure the arbitrator in looking at (d) is referring back to (a) (b) or (c) and not to just anything they pull out of the air.

4 p.m.

Mr. Callahan: The statutory interpretation--

Interjection: Ejusdem generis.

Mr. Callahan: How does that go? What is that famous Latin phrase?

Mr. D. R. Cooke: That is exactly what it meant.

Mr. Callahan: Ejusdem generis.

Mr. Onyschuk: It would allow greater flexibility given the fact that we have three bases for testing and this would allow for variability on that.

Mr. D. R. Cooke: You do not mind our adding the word "similar," provided we use your (a) (b) and (c)?

Mr. Onyschuk: Right.

Mr. Callahan: Every time you add a word, you make it more confusing. You are better to leave the rules to apply.

Mr. Gillies: We could leave it to the lawyers.

Mr. Callahan: They would spend a year trying to figure out what "similar" means.

Mr. South: It was very interesting getting the statistics from British Columbia in regard to what happened on second agreements after there was an imposed first agreement. Could we get similar statistics for Manitoba?

Mr. Chairman: I am sorry?

Mr. South: You were not listening.

Mr. Chairman: You are absolutely right.

Mr. South: Now that I have your attention--

Mr. Chairman: I was preoccupied for one moment.

Mr. Ramsay: Do we have to listen to you too?

Mr. South: Go to hell.

Mr. Ramsay: We were kind enough to let you speak.

Mr. South: As I say, I found the statistics we got in regard to BC and its experience in imposing first agreements very interesting. Could we get the same type of statistics for Manitoba?

Mr. Chairman: We already have those. We have them for Quebec and Manitoba as well as for the federal jurisdiction. You mean where there is first-contract legislation; right?

Mr. South: Yes.

Mr. Chairman: When we get into clause-by-clause, we will lay out all the experiences from the other jurisdictions so we can have a reasoned debate.

Mr. South: Thank you.

Mr. Chairman: Which you may think has been missing until now.

Mr. South: I was wondering.

Mr. Brandt: I have a question with respect to the early part of your brief where you commented on the imbalance of power between management and unions. Earlier, we had a submission by the Canadian Federation of Independent Business which indicated that about 100 per cent of all new jobs are being created by small business, by definition those with fewer than 50 employees. They went on to say that an even higher percentage of all new jobs are being created by new employers who have no more than 20 employees on staff.

In view of the fact that at some time many of those companies coming into the economy will be organized and confronted with first-contract arbitration of a kind that is being proposed to us, I wonder whether the statement you make in the early part of your brief is entirely valid, that there is this imbalance, which you suggest is totally on the management side.

Would you not concede that there are situations--you paid no attention to them in your brief--where the balance of power might be on the other side and the management might be in an unfavourable position, considering that the management could consist of a single individual, without a battery of lawyers, usually underfunded, with a very small capital base and few resources, when confronted by an organizing effort?

Mr. Onyschuk: It is usual in these kinds of situations that the balance of power is even more in the employer's hands, looking at it from an industrial relations perspective. The employer knows every employee and has a more intimate knowledge of what is going on. The employer can have a greater degree of control in weeding out the union activists. It is in the larger settings that the unions sometimes can get a foothold. That is one of the reasons the unions have found it difficult over the years to organize in the smaller units despite the horrific working conditions that may prevail.

I am sure you are all familiar with some management programs entitled something like "Keeping Your Company Union-Free." One of the premises of keeping your company union-free is that you create better working conditions, in effect substituting for much of what a union could put into that place; you create a good-faith relationship with your employees.

I disagree with you. In a smaller potential bargaining unit situation, the employer has a greater degree of power, and not wholly in terms of the knowledge; there is the threat of letting a person go and the fact that they are usually low-paid employees who have no savings they can fall back on in case it ever came to an economic test. In the larger areas, the employer probably would pay going rates to keep the union out. Workers may be a little more satisfied in that circumstance. Union organizers may not be found out as easily as in a smaller working situation.

Mr. Taylor: Does that take into consideration the fact that the little employer and his wife have personally signed a guarantee with the bank, that he has a chattel mortgage on his furniture, his house, his car and

everything else and that he is under tremendous economic strain and just cannot afford to be out of business?

The type of little business I have in mind may not be the type of little business you have in mind, but I can tell you that in small-town Ontario, in the part of the province I represent, we have a lot of little businesses where the employers are working darned hard and probably not even making minimum wage; if there is anything left over, they get it.

When you talk about the balance of economic power and the intimidating factors, some of the situations that exist in little businesses may not be the type of situations you have in mind in terms of the economic clout of a fairly substantial corporation. I do not know whether Mr. Brandt had that kind of scenario in mind when he was talking about the balance of the power, but small business associations and others have talked in terms of the balance of power being predominantly in favour of the strong unions, the steelworkers, the auto workers and the teamsters, for example, where you could not compete, with them pouring in a million dollars and paying them a regular wage to stay out on the picket line.

Mr. Onyschuk: You are operating under the assumption that a union in a small establishment is somehow going to drive it into bankruptcy. I am sure no union ever comes into force to drive an employer into bankruptcy.

Mr. Taylor: I agree with that. But it could be part of the problem, and that is what is often intimidating to little employers.

Mr. Brandt: The point I am trying to make relates to a sense of balance in looking to weigh the legislation too hard on one side or the other. The other statistic that troubled me somewhat in one of the earlier presentations we heard was that 50 per cent of all corporations in Canada, during the course of their lifetime, make no profit at all on a yearly basis. They may have a profitable year the year before or the year after; I understand all that--

Interjection.

Mr. Brandt: You could call it creative bookkeeping. The fact of the matter is that the government has a method of catching up with that creative bookkeeping; it is taxed in a different way. However, the statistical data show that 50 per cent of the corporations do not make money in a given year. You either accept the figure or you do not. It is not my figure. I am not presenting it as evidence that I have before the committee. It is evidence that has been presented to the committee.

4:10 p.m.

That being the case, I still feel some concern about the small employer you mentioned; the employee may not have any savings, may have been making \$5 an hour or whatever. I have had experience on occasion with the same sort of conditions my colleague Mr. Taylor pointed out, where a small employer may be making absolutely no money. The first few years of business, the early development years, are extremely difficult for the entrepreneur who is attempting to get something launched and off the ground. Usually the biggest problem is a lack of finances.

That affects the owner-manager corporation. It affects the employees as well. I respect that. I understand that problem, but it is a reality that has

to be dealt with. We have to be very careful in whatever we do that the legislation does not backfire on us for the very sector of the economy that is creating virtually all of the jobs that are producing the wealth that we all need and look forward to sharing in some fashion, and that sector of the economy is not in some way injured by legislation that is not carefully thought out. That is my only point.

Mr. Chairman: Mr. Usher and Mr. Onyschuk, thank you for your appearance before the committee. We appreciate your sharing your views with us. We have almost completed the hearing process now. We have one more day, at which point we will deal with the legislation on a clause-by-clause basis, so suggested amendments are helpful to the committee. Thank you very much.

Mr. Usher: Thank you. We appreciate it.

Mr. Brandt: There has been a massive spill of water that has occurred in this committee. I do not know whether it qualifies under the spills bill or not, but I think charges may be laid and are certainly in order. If we could, I would like to find out who the culprit was and identify him publicly so the Ministry of the Environment could lay the appropriate charges.

Mr. Usher: I would like permission to intervene in this inquest because there was a (inaudible) that Mr. Brandt should have recognized before that and stamped out.

Mr. Chairman: In view of Mr. Brandt's experience, he could proclaim the spills bill at this point.

Mr. Brandt: I am not the type who would tattle on a colleague. However, if Mr. Ramsay wants to own up to these evil deeds, it is entirely up to him. Mr. Callahan walked innocently back into this forum, anticipating that everything would be left in the manner in which he originally walked out of the room and found that was not the case at all.

Mr. Chairman: We have covered that pressing matter.

Interjections.

Mr. Chairman: Order. The next delegation is the Ontario Chamber of Commerce. The brief has been distributed and, depending on your view, it is a pink-tinged cover.

Mr. Taylor: Mine is orange.

Mr. Chairman: Yours is orange?

With us are Doug Gray and Elaine Roscow from the Chamber. You can tell that we have been at this for some time. The committee is getting a little punchy. We are pleased you are here. We know the chamber represents a very wide spectrum of the business community out there. We are pleased you are with us today.

ONTARIO CHAMBER OF COMMERCE

Mr. Gray: Thank you, Mr. Chairman. In order to clear up any remaining doubts about the observation about the colour of this document, perhaps we might agree that it could be considered to be salmon-coloured and put it to rest.

We are very grateful for the opportunity to be here and to be able to present our views on this piece of legislation that is now before the House. Before I touch briefly on the contents of the brief that has been handed to you, I might just expand somewhat on the observation the chairman made as we sat down with respect to the nature of the Chamber of Commerce itself, which is in fact mentioned in the covering letter just inside the cover page.

The Chamber, as you may know, is an amalgamation of a large number of other types of organizations, mainly local chambers of commerce. As such, we do not speak for small business, we do not speak large business, we do not speak for any size of business in between; we speak for the very large cross-section of people with whom we are associated and we are associated in that fashion right across the province from top to bottom and from east to west. Perhaps we are a little bit different from some of the other bodies that have appeared before you and may do so in the future in that we attempt to speak as far as possible for the broad cross-section of the population that makes up our membership.

The brief that we have given to you, to expand on the term itself, you will see is extremely brief in comparison with some of the others that you may have had the opportunity to peruse. This one is some three and a half pages in length. That is deliberate because we, in our own fashion, consider that the more succinctly one can make one's point, the more attention may be paid to it. Our experience has been that if you attempt to make the point in 50 pages, the main elements of your point may get lost in the translation.

You will see from the document before you that we start off with what has always been the Chamber's position on legislation of this sort. I want to emphasize that the main position we take is one that has not changed to this day. In our view, legislation of this sort is unnecessary and counterproductive.

In our submission, the introduction of this legislation will change the rules of the game to a very large degree and will make the exercise of collective bargaining something different from what it has been up until now. Up until now, the parties, and I use the term parties in the collective sense because I think it is important to recognize that the bargaining that has taken place up until now has been bargaining in the true sense of the word, in attempting to arrive at an agreement, are expected to arrive at their own agreement.

While the legislation will contain within it provisions that will attempt to assist the parties in arriving at that agreement and in ensuring that they live up to their obligation to bargain in good faith, in the end the bargain that the parties are expected to make is their bargain. It is the bargain that they must live with and with the exception of some rare examples with which we are all familiar relating to health care institutions, police and firemen and so on, the parties in the private sector and most of the public sector are expected to make their own agreement and live with it. In our opinion, the introduction of this sort of legislation will change that expectation to a large degree.

Having said that, we recognize the fact that as long this bill is being introduced, one way or another the Legislature, in all likelihood, will enact a bill containing provisions that deal with this subject. Recognizing that reality, we have made comments and will make some observations today on the terms of the bill as drafted. In that respect, I am looking at the bill that contains in it the proposed amendments that the Minister of Labour (Mr. Wrye)

has suggested. In our view, that bill as drafted does contain some fairly serious deficiencies and it is to those points that we directed our attention in our brief. I will simply highlight very briefly now, recognizing that you can all read what we have put on paper, and we then will be happy to answer any questions that any member of the committee may have for us.

4:20 p.m.

The first thing we mentioned in our brief, as you will see, is the observation that there is no definition in the act of what a first-collective agreement is. In our view that omission is unfortunate because it is important that the parties clearly understand the rules of the game. It would assist both the trade unions and employers, who must live under this act, to have any ambiguity clarified one way or the other.

Be that as it may, we would also observe that if there is no definition of first-collective agreement, there may well be a number of situations that can come up, that indeed will come up, in which it will be undoubtedly contended that a first-collective agreement is an issue. Any rational third party would have difficulty accepting that some of these examples are really intended to be covered by the act.

One example is the simple case of where one local of a trade union is replaced by another local of the same trade union. I doubt that anyone in the room would really expect that it was intended that result in a new first-collective agreement. It would then be covered by this act.

Nevertheless, since each local of a trade union in this province is considered to be a separate trade union in law, it is not inconceivable that technically speaking that situation would give rise to a new first-collective agreement and therefore be covered by this act. We have set out a couple of other examples, which we also submit would be difficult to conclude should be covered by this act.

When all is said and done, we suggest that there be a definition of first-collective agreement that takes into account and covers what is really intended to be covered. What is really intended to be covered is the situation where defined bargaining or at least the great bulk of it is subject, for the first time, to some collective bargaining relationship. That is what the act is intended to aim at. We think that is something that ought to be clarified.

The second point we make in the brief is to observe that the only conduct that the act, on the face of it, seeks to take into account is the conduct of the respondent and in one instance specifically, the conduct of the employer. We are puzzled by that. It may well be inferred, and it may be a correct interpretation of the act as drafted, that the conduct of the applicant is irrelevant.

To take the example of where trade union has engaged in the conduct that is listed in subsection 2, it would certainly be argued and it may well be right in law that the conduct of the union is simply irrelevant, and the fact that the union has failed to make reasonable efforts to conclude a collective agreement may well be immaterial. We suspect that is an oversight but in any event, we think that ought to be corrected and there ought to be a statement in the act, for which we have suggested some wording on page 2 of the brief, to take into account the conduct of the applicant.

I should point out that what we have done in the suggested wording is to simply adopt the threshold test or at least part of it as drafted. It would be our view if there were some different threshold test adopted, as we have suggested later on in the brief, really in fairness that ought to be the same conduct to which the applicant ought to be subjected. For example, if the threshold test was a bad-faith bargaining test, we would see our proposed wording on page 2 amended to cover bad-faith bargaining on the part of the applicant.

We also have suggested, as you have seen, that we have some difficulty with the threshold test as it exists in the bill as drafted. We listened with interest to the discussion you had with the group that went before us. Quite unlike the group that went before us, we see the need for a threshold test. Indeed, we think this threshold test is not something that can be reasonably administered. In our view, to attempt to create something in between a bad-faith bargaining test and a hard-bargaining test is difficult, if not impossible.

It is reasonably well accepted that it is legitimate for one party or the other to go to the wall on a matter of principle and still be engaging in good-faith bargaining. To take the opposite example, no one would say it was improper--and I certainly would not say it was improper--for a trade union to go to the wall on a matter of principle. Trade unions do it and have done so ever since trade unions came into existence. Indeed, most would say that is in large measure what the trade union movement is all about.

If the employer simply will not give in on a particular issue the trade union considers to be fundamental, then the union has the right and obviously must continue to have the right to simply say, "We will impose economic sanctions for as long as it takes to get what we think is important for our membership." By the same token, it cannot be considered any more improper for the employer to say: "That issue is one of serious importance for us and has grave implications for the conduct of our business. We will accept whatever economic sanctions you care to impose for as long as it takes."

In that scenario as long as both parties are acting in good faith, I doubt that anyone would say that conduct, whether it be engaged in by the trade union or by the employer, is improper. In our opinion, this bill attempts to construct something in between that scenario and a bad-faith bargaining finding. Our opinion, simply put, is that we do not think there is a decision-making body anywhere that could rationally determine where that line falls. It is hard enough now to determine what constitutes bad-faith bargaining, let alone to try to construct a finding of where the line may fall for something in between legitimate hard bargaining and bad-faith bargaining.

The board in this province has, through a long series and through years of developing its jurisprudence, come up with a standard so that I think both parties now understand reasonably well what constitutes bad-faith bargaining. In order for the parties to understand their obligations under the act, we think it is important that that standard be maintained and that the consequences that may flow from a finding of bad faith should flow only where that finding is made.

4:30 p.m.

The next issue that we have commented on is subsections 11 and 12 on page 3 of our brief. These subsections deal with the obligation to reinstate employees. We have no quarrel with the proposition that employees ought to be

reinstated when a strike is over, but we have difficulty with the way the provision is presently drafted, which might imply--not only might imply but does say--that all employees must be reinstated. The only exception to that is where the employer has discontinued all or part of the business so he no longer has persons engaged in performing that work.

The difficulty with that is it does not take into account the situation where the employer has been economically damaged by the strike so that he simply has less work. If he has less work, we have difficulty understanding why he would have to recall 100 per cent of the employees. Again, that may simply be an oversight, but if it is, we hope that some consideration might be given to amending subsection 40a(12) in particular.

Another subsection that we have difficulty with is the one that deals with criteria; that is subsection 40a(15). There was some discussion of that subject by the group that was here before us, and we listened with interest to that discussion. We think that any employer who does business in this province must of necessity do business with all other employers engaged in the same business, whether those employers are unionized, nonunionized or partially unionized. It would be very unfair, in our view, to require the arbitrator to consider only terms and conditions that have been negotiated through collective bargaining when, for example, the employer may operate in a sector that is very lightly unionized. That employer must compete with all the other employers, and surely the arbitrator must be able to take into account terms and conditions of employment that relate to all employers in that sector.

Furthermore, we also think that the standard to be used, even if we look at collective bargaining, is other first collective agreements. Any employer--and any trade union, for that matter--that goes through the process of collective bargaining recognizes that the first collective agreement is a first step. The standard you use is to look at other collective agreements that have been bargained more recently in that sector rather than to look at something that may have been bargained over 25 years.

The other subsection with which we have some difficulty is the duration provision. One year is a standard that is not unfamiliar in this country, and we think that one year is a more reasonable standard to use. It is very difficult with a newly unionized company to anticipate what the appropriate financial package ought to be in the second year. Most of us do not have crystal balls that go beyond what the next fiscal year may bring. To require an arbitrator to impose something that will run beyond that is, in our view, somewhat unrealistic.

That is a very brief summary of our submissions. We would be happy to elaborate on any of them or to answer any questions that any of the members of the committee may have.

The Vice-Chairman: Thank you very much for your presentation. A couple of the committee members have indicated their desire to engage you in questions.

Mr. Gillies: Thank you for your presentation. It was brief, certainly, but you touched very succinctly on some of the most important issues that we have identified in the committee.

If I could go through it with you, your first point I find rather intriguing. Frankly, it had not occurred to me that we would require a definition of what a first collective agreement is. I wonder whether you could

elaborate on that. I just assume that we are talking about the first contract signed between an employer and a new bargaining unit, but I may be missing something.

Mr. Gray: Let us take the first example I have given in the brief. You have an agreement, let us say, between ABC company and XYZ trade union, Local 1500. Technically speaking, that is an agreement between that company and the trade union known as XYZ union, Local 1500. If through some process the identity of the union is changed from Local 1500 to Local 1501, technically that results in a new bargaining relationship between that company and a new trade union called XYZ union, Local 1501.

Mr. Callahan: Excuse me. Are you suggesting that they have changed the corporate entity or the certification?

Mr. Gray: No. I am talking about changing the trade union, just to use that example. The same thing may come up if you change the corporate entity.

Let us just follow this example through. If this is a new bargaining relationship, then technically you may have a new first-collective-agreement set of negotiations between ABC company and XYZ union, Local 1501. I doubt that anyone would really think this is the kind of situation this act is aimed at, because in reality you still have the same trade union with a different name and you have the same company.

Let me explain technically how it may happen. You may get a new trade union applying to the Ontario Labour Relations Board for bargaining rights, and that new trade union may be XYZ union, Local 1501. Technically the old union, Local 1500, has its bargaining rights terminated and the new union has a new certificate that says it is the bargaining agent. The same thing would happen if a group of employees decertified the union and that same union applied after a few months and was successful in being certified again. Again I doubt that anyone would really think this is the kind of situation this act is aimed at, but technically you may have--in fact, I suspect you would have--a new first collective agreement.

Mr. Gillies: In the case of a company changing ownership during the life of a contract, my understanding of the law is that the new owners then inherit that contract.

Mr. Gray: That is right.

Mr. Gillies: The points you have made about the bargaining unit changing--

Mr. Gray: The bargaining agent.

Mr. Gillies: --the bargaining agent, pardon me--are interesting. I wonder whether our ministry representative would be able-- Mr. Failes, has that kind of situation been contemplated? What would your interpretation be?

Mr. Failes: If you had a new union in there with a new agenda, if you want put it that way, a new set of bargaining goals, in effect there would be a new relationship. I do not know whether I would have very much trouble with applying the legislation in that case. They may have just as much difficulty getting that relationship started.

Mr. Gray: I have a good deal of trouble with that myself.

Mr. Gillies: Yes. My problem with it is that this, to me, represents a fairly complicated and a fairly expensive procedure. I can foresee a situation now where a small business might have to go through it twice or three times in four or five years. Surely that is not what we are after.

Mr. Taylor: As long as just one of the parties is a virgin party, presumably you will have a first contract. Is that it? Either one of the parties.

Mr. Gray: That seems to be what the bill may say in the absence of a definition. But our main point is that, in the absence of a definition, we are all left wondering what the situation may be.

Mr. Callahan: To follow up on that point, surely the purpose of this legislation, and the only need for it, is to address the difficulties that have been experienced in such problems as Radio Shack and in situations where the employer simply says: "I do not care whether there is a union in here. We are not going to negotiate a collective agreement." If that is the atmosphere, or the evil, to address Mr. Taylor's concern always about the evil that this is addressing, surely you do not want to build into it some device by which an employer--or, for that matter, even a union--can play games. They could play games. It does not even have to be a different union; it could change its corporate entity. The company could change its corporate entity.

Surely the specific object of the legislation is to assist employees who have attempted to bargain with an employer and who have been frustrated as a result of the acts of probably the employer, because that seems to be the nature of the actions that have occurred before. To put any type of technicalities in there is just creating a loophole through which this entire legislation could become a sham--I would think, anyway.

4:40 p.m.

Mr. Gray: I agree with you entirely, and the entire premise of our suggestion is to assist in preventing people from playing games, to use your term. We think that the way it is drafted now there is great potential for some people to play games. We are not suggesting that everybody would, but there is great potential for it.

Mr. Callahan: Let us say the union got to arbitration and was in the midst of arbitration with XYZ company and it decided to change to XYY company. Are you suggesting that that ends the whole thing?

Mr. Gray: I am sorry. I am not sure I--

Ms. E. J. Smith: The company could also play games.

Mr. Callahan: The company changes its name.

Mr. Gray: I have no difficulty with something that would prevent the company from playing games either; do not get me wrong. However, I think the situation you have raised, the case in which the company simply changes its corporate name, is already dealt with and the bargaining rights are deemed to follow along automatically. I do not think that is something that needs to be looked at, although as a matter of principle we do not have any quarrel with your basic proposition that neither side should be able to play games. All I

am saying is that the way it is drafted now there is a great potential for any trade union that so desires--and I am not suggesting that any necessarily would--to play games. We have suggested some ways in which those games may be played.

Just to deal with the ministry representative's observation, I take issue with the proposition that if you simply have a change in the bargaining agent--and let us say it is a complete change in the bargaining agent, even where nobody is playing games; for example, if the United Auto Workers is displaced by the United Steelworkers of America, and I know that under the Canadian Labour Congress constitution that is a difficult proposition, but let us assume it happens--I just do not see why this legislation needs to apply to that.

If you have a situation where the company has had a bargaining relationship with a strong trade union for many years and it happens to be replaced by another strong trade union, I do not see why this act needs to apply to that--or to any trade union, for that matter.

The Vice-Chairman: Ms. Smith has a supplementary. I wonder whether Mr. Failes wants to expand on that any further.

Mr. Failes: Two points. First of all, if it is a strong trade union, it is not very likely to be decertified.

But quite apart from that, let us take a different situation. Let us suppose there is a sweetheart union. The employer voluntarily recognizes that union, he engages in a collective bargaining relationship for a number of years and the employees decide they want a real union. If we adopted your approach, those employees would not have access to this legislation. It would not be a first collective agreement.

Mr. Mackenzie: That is one of the more effective weapons used. I have run into it myself on more than one occasion.

Mr. Gray: Except that, in law, whatever trade union is there is the bargaining agent for the employees. They have made the decision about what their bargaining agent ought to be, and in law that bargaining agent can only get bargaining rights if it qualifies under the act. If you have a sweetheart deal, the act in its own terms right now prohibits that union from being certified in the first place. We have to take the law as it is now and not speculate about what may or may not happen in funny cases.

Mr. Mackenzie: --all of the people for a union that was not really a union?

Ms. E. J. Smith: It seems there is a valid point here. We are setting this legislation in place to deal with a new situation. That is the way I saw it, anyhow.

Going through this when you first introduced it, I went through just quickly reacting to what I consider to be the intent. For example, if one local of a trade union replaces another, does it get it? No. If it is decertified, does it? Yes, because then you still have a company that maybe has refused to deal with unions and managed to succeed, and maybe it never has had a union agreement. Number three is that if one is displaced for another, you can get some pretty bitter interunion fights, and I do not think the company should get caught up in that.

Mr. Taylor: It is a virgin ground pregnant with possibilities.

Ms. E. J. Smith: My reaction in reading it is that we were dealing with nonunion companies. If you are talking about sweetheart things and that sort of thing, it should be dealt with under the Labour Relations Act. I think this is simply addressing a new situation with a new union coming into a nonunionized company and the rest should be addressed in the act. That is my reaction off the top of my head without further advice. I think we need clarification on this.

Mr. Gillies: Mr. Chairman, I was trying to get the floor back.

The Vice-Chairman: Go ahead, Mr. Gillies.

Mr. Gillies: We are amending the Labour Relation Act here, so if there is a problem, I guess it could be addressed. As I read the successor rights section in the act now, if there is an amalgamation or a transfer of jurisdiction within the union, then that is already addressed in the act. I fail to see why the first-contract arbitration process should kick in in that instance.

As Ms. Smith said, in the case of a decertification and another union coming in, and there is not a contract in effect, I can see some case being made for Bill 65 applying. I think the chamber has brought up a very good point.

Ms. Smith: Yes.

Mr. Gillies: I think most of us have a pretty specific idea about what this type of legislation is supposed to do. I do not believe it is intended to prolong game-playing on either side of the fence, such that the parties are going through this process a number of times. It is not what I see at all.

Mr. Gray: I agree that there is a distinction in the case where there is a decertification, where there has never been a collective agreement, where after a year, let us say, the employees decertify and there never has been a collective agreement in that situation. If some other union or even the same union applies and gets certified again, then, sure, you are subject to a first collective agreement.

If you have a case where, let us say, the company has been unionized for 20 years and the employees one day--and I can give you an exact example, but I am not going to use any names--decide they want to have another union, one of the ways they can do it--and we all know these things happen--is to apply to decertify the incumbent union, and then very shortly after that, another union applies to be certified. I have one particular example in mind where two very strong unions, both members of the Canadian Labour Congress, were involved. It has happened many times before, but I think most of us will have difficulty accepting that it is really a first contract or a first collective agreement situation that this act ought to cover. Anyway, I think the point has been made.

Mr. Gillies: I think it is an excellent point.

Mr. Callahan: With Mr. Taylor's very metaphoric terminology and some legalese, we can probably get the right answer, namely, "a virgin contract pregnant with possibilities."

The Vice-Chairman: While on this point, I am going to ask the committee if it would like us to request from the Minister of Labour where this would kick in--Mr. Failes maybe has further clarification on this--before we do the clause by clause so that we feel we are on sound ground understanding it.

Mr. Taylor: We have legal counsel with us now. Can we not get an opinion on that right now?

Ms. Madisso: I would have to do the research and provide you with something on it.

The Vice-Chairman: Is that the wish of the committee?

Mr. Gillies: If the ministry could provide us with, let us say, six examples of what happens when it is a new this, it is a new that, bang, their interpretation, not this committee's, of what is supposed to happen, I would find that most helpful.

The Vice-Chairman: All right.

Mr. Gillies: Just moving along then.

The Vice-Chairman: Continue, Mr. Gillies.

Mr. Gillies: Thank you, Mr. Chairman. On getting into subsection 40a(2), I certainly share your concern about the language in clauses (b) and (c) constantly referring to the respondent and his failure to bargain, etc. Your amendment would be one way to go about it. In view of the fact that in subsection 1 the language says, "either party may apply to the board to direct the settlement," I wonder whether you could just use that same language in (b) and (c). I am not saying the committee will decide to keep (b) and (c) as they are anyway, but just to address this problem where it says "respondent," you substitute the words "either party."

4:50 p.m.

Mr. Gray: I guess the point of our amendment is that we think there ought to be some penalty on the applicant if the applicant engages in the very kind of conduct the act is seeking to address. The only meaningful penalty would be for the application to be dismissed. I would feel more comfortable with the way we have phrased it than the way you have suggested simply for that reason.

Mr. Gillies: Fair enough.

Mr. Taylor: The way it is now the race would seem to be to the swift to determine who is the applicant and who is the respondent, to get the advantage.

Mr. Gray: Sure. To use another example, if the company were to run off and apply under this act and the company had engaged in the conduct that the act seeks to cover, we do not see why the company should not have its

application dismissed. It would not prevent the union from applying itself, but we do not see why the company's application should not be thrown out. The same rule would apply if the union engaged in conduct that the act seeks to get at.

Mr. Taylor: I have a further supplementary, if I may, seeing that everyone else has wormed into your time allotment, Mr. Gillies.

The big problem or the guts of the bill is access. Is it automatic or is it something less than that? If it is less than that, is it something more than bad faith? I have listened to you and I think what you are saying--please correct me if I am wrong--is that there is adequate jurisprudence in regard to bad faith at present, which would probably give the board sufficient latitude to cover whatever concerns we have without establishing a new piece of turf and a new jurisprudence for something that is supposed to be not quite bad faith, but--

Mr. Gray: Something in between.

Mr. Taylor: Something in between, yes.

Mr. Gray: That is exactly our point. I think you have captured it.

Ms. E. J. Smith: Except that is what the bill is trying to do.

Mr. Gray: That is the difficulty we have with it because we do not think realistically it can be done.

Mr. Taylor: I suppose jurisprudence is an evolutionary thing in a way as well, and that if there is to be an expanded territory, it should be through that jurisprudence of bad faith rather than trying to establish a new area.

Mr. Gray: Yes.

Mr. Mackenzie: That is coming from a lawyer.

The Vice-Chairman: I hate to arbitrate between Tories, but I want to defend your rights, Mr. Gillies.

Mr. Gillies: Actually, I was going to challenge you on that very point. I happen to believe there is a middle ground between bad faith and unfettered access and that we can find it. I just wonder whether you have had an opportunity to review any of the suggestions that have been made to the committee in the brief by the steelworkers or others who are searching for language that is certainly more definite and more workable than what we have here, but stops short of bad faith.

I have some sympathy with the labour movement, their concern being they do not feel they are going to get many findings of bad faith, and they point to the Eaton's situation.

Mr. Gray: I do not want to use the names of any organizations or any particular case. The example I used is one that I do not think any tribunal could sort out under this bill, where the employer or the trade union, for that matter, simply takes a stand on an issue of principle and says: 'We feel very strongly about this. We are going to dig in our heels. That is the way it

is going to be, and you can strike until hell freezes over." This is something that happens in collective bargaining from time to time.

Where does that leave us under this bill? Is that taking an uncompromising bargaining position without reasonable justification?

Ms. E. J. Smith: Yes.

Mr. Taylor: Do you say that, Ms. Smith?

Ms. E. J. Smith: Yes.

Mr. Taylor: Shame on you. You are in a political party without principles.

Mr. Gray: If the union says to the company, "We want this particular thing and we are going to strike for ever to get it," is that taking an uncompromising bargaining position without reasonable justification? I would challenge any trade union leader to say that contravenes this legislation. Trade unions in this province--and quite rightly so--have taken that kind of position since time immemorial. Yet I would find it difficult and I do not hear anyone saying that we are really seeking to impose a different standard on the employer than we would on the union. I use that example as one that I think any tribunal is going to have trouble with.

In that example, does it amount to a failure to make reasonable efforts to conclude a collective agreement? I would be surprised if any trade union leader in this province would say that a union which took the position that it was going to obtain a particular concession, it was going to strike for however long it took to get it, was failing to make reasonable efforts to conclude a collective agreement and was violating this act. I would be surprised if any trade union leader would say that. If any trade union would not say that, then I would take the position that we cannot go around imposing some different standard on the employer. That is where I take issue.

Mr. Callahan: Would you think that a middle ground could be that it appears to the board that the parties are unlikely to enter into a collective agreement within a reasonable period of time in that situation?

Mr. Gray: No. That is simply hard bargaining. If the union says, "We are going to get a dental plan for our employees in this company and we are going to strike for however long it takes to get it," then how can anybody say that is wrong? How can anybody say it is unlawful? How can anybody say some tribunal should step in and say it is going to force an agreement on these parties, simply because one of them has decided to take a stand on a matter of principle?

Mr. Mackenzie: They are not going to do it on a dental plan but they might make it on a grievance procedure, which is fundamental to a union.

Mr. Callahan: You are making a very excellent pitch for automatic access.

Mr. Gray: Bad faith is at least a standard that the parties have come to understand more precisely over the last 25 years as to where the line has to be drawn. Since you have raised automatic access, let me deal with it quickly. All you are doing is changing the rules of the game even more

fundamentally and then it does not matter what the parties do in the bargaining process

Mr. Callahan: They can just sit back and do nothing.

Mr. Gray: They can just sit back and do nothing. One of them can wander off to the labour board and get the contract. If you want to destroy collective bargaining altogether in the province, do not have a threshold test.

Ms. E. J. Smith: If it is bad faith, we do not need this bill.

Mr. Gray: We agree with that.

Ms. E. J. Smith: If that is your position--

Mr. Gray: We said that at the beginning of this brief.

Ms. E. J. Smith: I realize that.

Mr. Gray: We disagree with the bill. There is no doubt about it.

Mr. Gillies: I will try to wrap this up. The points you made on subsections 40a(11), (12) and (15) are very well taken and you will be seeing some amendments from our party on those. On subsection 16, some of the delegations we have had before us feel very strongly about the two years in terms of cementing the relationship between a new bargaining unit and the company. Others feel it is long and inflexible. What do you think of the Ontario Mining Association's suggestion made to us today that it would be a period of at least one and no more than two years at the discretion of the arbitrator?

Mr. Gray: We would like that better than the existing draft, but that invites the arbitrator to engage in the very kind of crystal-ball gazing for the second year, if he decides to impose one, that we think he should not do.

Mr. Callahan: I think they are going on strike. They are both backed against the wall with an uncompromising situation.

Mr. Vice-Chairman: I still have you on the list, Mr. Callahan.

Mr. Callahan: I was going to address the time frame. From some of the briefs we have received on the experience in Manitoba, Quebec and British Columbia, it seems that those who have the one-year period have had very little success in negotiating a second collective agreement because there is not sufficient time to establish a relationship strong enough to withstand collective bargaining.

Mr. Gray: That raises the question whether the consequences of a one-year period or a two-year period would make any difference. I do not know whether it would make any difference. I suspect it would not, but I do not really think one can tell from the evidence.

Ms. E. J. Smith: May I ask a very uninformed question and for anyone's opinion? We keep having British Columbia pointed at us one way or another. In my unprofessional way I think of the BC situation as always being extreme, and that is why I have difficulty relating to statistics and so on

about BC. What we have is the BC agreement put forward by the union as an ideal and then to some extent we have management coming in and saying, "Look at all the decertifications." I cannot help wondering if they are going to change the government in the meantime.

I think of BC as being two extremes and us being somewhere in the middle; so I automatically block out anything said about BC.

Mr. Taylor: You are in the middle all right.

Mr. Gillies: I think you are wise to disregard it.

Mr. Vice-Chairman: If there are no further questions, on behalf of the committee I would like to thank Mr. Gray and Ms. Roscow for presenting this brief to us today.

Mr. Gray: Thank you, Mr. Chairman.

The committee adjourned at 5:03 p.m.

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STANDING COMMITTEE ON RESOURCES DEVELOPMENT

LABOUR RELATIONS AMENDMENT ACT

THURSDAY, APRIL 3, 1986

Morning Sitting



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Staff:

Madisso, M., Research Officer, Legislative Research Service

Witnesses:

From the Ontario Federation of Labour:

Pilkey, C., President

Peacock, H., Legislative Representative

O'Flynn, S., Secretary-Treasurer

From the Retail, Wholesale and Department Store Union:

Collins, T., Director, Local 1000

Hayes, J. K. A., Counsel; with Cavalluzzo, Hayes and Lennon

Carson, L., Employee, Eaton's

Kessig, P., Business Agent; Employee, Eaton's

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Thursday, April 3, 1986

The committee met at 10:14 a.m. in room 228.

LABOUR RELATIONS AMENDMENT ACT
(continued)

Resuming consideration of Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: We have two presentations this morning, one at 10 and one at 12, and then Professor Weiler this afternoon. We have here today the people from the Ontario Federation of Labour. I think they understand that we have been holding public hearings on this bill. This is the last day of the public hearing process. When the Legislature comes back in a couple of weeks, we will deal with the clause-by-clause aspect of the bill to determine whether any amendments will be made. This is the windup of the public hearings today.

We have with us Cliff Pilkey of the Ontario Federation of Labour, Hugh Peacock, who used to be a member of provincial parliament in a previous incarnation, and Sean O'Flynn, who is the secretary-treasurer of the OFL. Welcome, gentlemen, to the committee. We are pleased you are here.

ONTARIO FEDERATION OF LABOUR

Mr. Pilkey: We appreciate the opportunity to make a presentation to the standing committee on resources development. I do not have to remind you that this whole question of first-agreement legislation is one that has been discussed for some time. Finally, the government, in its wisdom, has seen the necessity to legislate first agreements. I guess we are not really making the case at all for first-agreement legislation. What we are talking about is the specifics of that legislation and how we perceive it impacting on the collective bargaining process in Ontario.

First, it is absolutely essential that we have adequate first-agreement legislation. In our view, the bill, as it is formally presented, does not respond to the problem, the problem being negotiating first agreements and eliminating protracted strikes on first contracts. We want to respond to that problem. As I said, I do not believe the present legislation, as it is drafted, would respond to that.

One of the things we have said since this bill was introduced, and even prior to that, is that it makes little sense to have legislation that tracks bad-faith bargaining or, alternatively, uses bad-faith bargaining as a test before the legislation is applicable. It is a test which is so difficult you would have long periods of litigation in front of the Ontario Labour Relations Board, because I suspect very strongly that is where you would have to make the case. Second, while this process is in effect, you could have the organization taking economic sanctions against the company or companies and you would not get a resolve for some time.

If one looks at some of the cases where the employer has been charged with bad-faith bargaining--not that one gets a collective bargaining agreement, but if one goes back and does some surveys and finds out what has happened at the Ontario Labour Relations Board--one will find there have been very long periods. While the present legislation does not talk about bad-faith bargaining per se, our advice has been that the tests under the present legislation will be equally as difficult as bad-faith bargaining itself.

I guess we are going to continue with that legislation that takes us down this long road of litigation and strikes on first contracts, and I do not think that responds to anything. Let me tell you, my friends, what I think it does.

If you are trying to put legislation in place that resolves what we consider a very difficult problem in the collective bargaining process and its first agreements, if we do not respond to it in a very positive way, the only thing you do is to poison the relationship between the parties. What you are trying to do is get a first agreement, have the parties begin to understand one another and work that through. We understand that.

2:20 p.m.

Hell, we have agreements with many corporations and companies in Ontario and, sure, sometimes they end in strikes, but at least there is a relationship there. There is an understanding. If you have first-agreement legislation that does not somehow respond to that relationship, then I do not think you have done anything. When the agreement opens up the second time around, you will have a very difficult problem negotiating that second contract. What you need is a mechanism whereby there is not a great struggle that takes place in front of the board with all the recriminations that flow from it.

The union has its people there, the company has its people there, and there are charges and countercharges against one another. All of a sudden, if they were not enemies before, it is damned sure they are now. You cannot have that. That is not part of the process. It has to be eliminated. You cannot have the long, protracted fights that take place in front of the boards or subsequently in the courts.

Second, unless there is a process in place that is more amicable and gives greater access, you are also going to have first-agreement strikes. God, we have had our experience with them, my friends. In some of them it has been a disaster. I recall a little while ago standing on the steps of the Peel police headquarters in Brampton as a result of the police involvement in a strike situation there. Even in the city of Toronto, the police department understood the problem that exists out there and they have now provided full-time people. All they do is get themselves involved in strike situations and, more particularly, first-agreement strikes, which are damned difficult. They want to try to make that strike or economic sanction taken by the union more amicable but it is very difficult. As I said, you really poison the relationship.

I firmly believe we have to have legislation that provides automatic access. I am not persuaded that the present government is prepared to go that far. Having said that, for God's sake, provide a piece of legislation that makes the test much simpler than bad faith bargaining. Let us get all this litigation behind us and not get into those protracted struggles in front of some tribunal, whether it is a court or a quasi-legal tribunal. Let us get a piece of legislation that provides access without all the fights that take place.

I have also heard people say this first-agreement legislation would destroy the collective bargaining process. The people who are saying that are not the trade union leaders. We are prepared to take that risk. We do not want compulsory arbitration. We think the free collective bargaining process has been a useful instrument for working people in this country. We are not saying that you abandon that; we are saying let us get that first agreement behind us somehow. By the way, that will impact only a minority of agreements because my guess is that the collective bargaining process will resolve a number of those first agreements without going through the legislation. However, we have to respond to those very difficult ones. In the brief, we have alluded to some of those long, protracted, difficult struggles that have taken place.

I do not think it is going to destroy or inhibit the collective bargaining process in any way. Let me give you an example, and I do not know if this is a perfect analogy. One could argue about that piece of legislation--and I have forgotten the bill number--on automatic checkoff. I remember when the government introduced that. Why? We were having great difficulties on first agreements because the company was saying, "We are not going to give you first agreement because of union security."

The companies had known for a while that the unions were not prepared to sign a collective bargaining agreement unless they had decent union security. They knew that would take them into a strike, and also they got holier than thou and said, "We cannot have union security where it forces workers to pay union dues." We were not even talking about membership in the union. We were saying: "You pay your way. You get the benefits of the organization; you ought to contribute to it."

The government of the day felt it ought to legislate it into existence and that would eliminate that as a fight for first agreements.

It was sort of a tradeoff. We will tell you what it was. It was a couple of things, but I will only allude to one. The employer had a right to ask for a vote on the last offer its side had made. I am making that point because one could argue that this somehow impeded or stopped the collective bargaining process. We went along with that one, and I do not have to tell you, they have not won very many of them. Nevertheless, they have had the opportunity to terminate the collective bargaining process while this bill has gone on.

Do not be taken in by the fact the collective bargaining process is not going to be operative. It is; it is alive and it will be well, and we do not have any problems. I do not know why these champions of the collective bargaining process, and all of them outside the labour movement, all of a sudden become champions of the collective bargaining process. It puzzles and amazes me that they begin to champion that.

We need decent legislation that provides automatic access, but if it cannot be, then do not make it so god-damned onerous that we poison those relationships before they ever get off the ground. There is a much simpler process of access to the legislation.

I do not know whether Mr. Peacock or Mr. O'Flynn want to say anything. Most of the things I have alluded to, and a lot more, are embodied in our presentation. I suggest members of the committee take a look at it at their leisure. I am not suggesting they read it at the moment. It makes the case for first-agreement legislation that is more palatable than the bill as it has been currently presented to the Legislature.

Mr. Peacock: Perhaps I can respond and answer questions, Mr. Chairman, rather than add anything. Mr. Pilkey has reviewed it.

Mr. O'Flynn: The members should be careful about the kinds of amendments they make to the legislation because they have to be interpreted by the Ontario Labour Relations Board, which is already overburdened and backlogged with work. If you make this test difficult, such as bad-faith bargaining or anything like it, then the board as it is will not be able to cope with it. I speak from some experience at the board.

10:30 a.m.

Mr. Chairman: Thank you, gentlemen. You have put your finger on the issue with which this committee will certainly have to grapple when we get to the amendment stage.

Mr. Callahan: Mr. Pilkey, we have heard a lot of witnesses here who were pleading for open access, and you have reiterated that, but I think you are realistic enough to realize that is not the current atmosphere in which we are operating. I think access is really at the heart of this entire legislation. In addition to that, there is an atmosphere of political--I do not use that in a partisan way--good sense to maintain a balance within the labour community, employer-employee and union-employer. If you go too far one way, you are going immediately to exacerbate the reactivity of those companies which have had a history of not wanting a union at all. Even though a union has been certified, they have done everything possible to avoid having that union receive its status to represent the employees.

Against that background, if the access preconditions are such that it swings the balance too far one way as opposed to the other and it is not a middle-of-the-line test, I suggest you are going to exacerbate the already hot condition of these companies that do not want a union to start off with. You may bring in some of the moderates who heretofore have tried to bargain collectively in a fair way because they are going to say, "Here is the Legislature of Ontario swinging too far one way against us." I am sure you will agree, it is no simple task for this Legislature to come up with the right recipe that will maintain the present effective and good labour code that we have in this province and not allow it to become one that is viewed as being swung to one side.

Having said that and looking at the wording of the government's proposed bill, I ask you a number of questions. First, do I gather from what you are saying--I think I am right in this--that the tests, the preconditions there, really are nothing more than bad faith?

Mr. Pilkey: Right. That is our information from our legal people. Let me tell you how they are putting it to us. We will use the Eaton's strike as an example because it is a most recent one. They are saying the Eaton's strike would have been no different and the decision of the board no different from what it was under this legislation or under subsection 40a(15) on bad-faith bargaining.

Mr. Callahan: I saw in Mr. O'Flynn's brief that they gave you that advice. I think one has to recognize the background in which you get advice. I happen to belong to that revered profession and I could argue a point on both sides, and I hope as convincingly on both sides. That is the nature of the profession. We have heard statements here from lawyers who obviously represent

employers on a consistent basis. I believe, subject to my colleagues correcting me, that some of them have at least said that this is something less than bad faith. The conundrum is that you have two hired guns, and I suppose the only way you will find out the true answer is to have a shoot-out.

Maybe we can avoid a shoot-out by getting some other person. We have had a lot of quotations from a number of people who have written about this subject. Mr. Weiler has been quoted on numerous occasions. I presume he is an expert in this field and that he has not just academic experience but a significant amount of practical experience. However, his writing and his opinions are normally held in high regard. Just so that I have it on the record, you are shaking your head, yes?

Mr. Pilkey: Oh, yes. I do not have anything against Paul Weiler, but let me tell you about Paul Weiler on this one. I have not talked to Paul about this, but I very strongly suspect that Weiler may want to defend the British Columbia legislation. He was the god-damned author of it, so why would he not defend it? If Paul were sitting here, I would tell him, "My friend, you are suspect, Mr. Weiler." I know Paul well and I have great confidence in him.

Mr. Callahan: I have no idea what he is going to say.

Mr. Pilkey: I have no idea either, but if he is going to be defending that, as I say, he was the author of the BC legislation. That whole thing is all Weiler.

Mr. Gillies: Interestingly enough though, in his book he is now citing deficiencies in the BC law. We had quotes yesterday.

Mr. Pilkey: Oh, good.

Mr. Callahan: As I understand it, the BC legislation calls upon the minister in his discretion to set this whole thing into process. You have to admit this legislation certainly goes a step further in that it is not a ministerial thing; it is part of the process.

As to the crux of the wording, you have some concern and the various legal people have different opinions as to whether it is bad faith or less than bad faith. I am sure Mr. Mackenzie is going to ask the next question. I do not know what Mr. Weiler is going to say, but let us say he supports this wording as being less than bad faith. If there were some definitive way to get a decision from a higher court--and there is machinery for that under the Courts of Justice Act; the Lieutenant Governor can refer the proposed wording of the legislation to the Court of Appeal and it can make a definitive statement as to whether that comes within the framework of the previous definition of bad faith the Ontario Labour Relations Board has used to this point--if you had that, you would have a decision of the highest court of this land. If you had that--here comes the question--would you be content with the wording in the bill?

Mr. Pilkey: No.

Mr. Callahan: Somehow I thought you were going to say that.

Mr. Pilkey: Our proposals respond to that very question, and I do not think we need to go into a court of law. Second, I have more confidence--God forbid; I am saying this--in the Legislature than I have in the courts.

Mr. Callahan: It is very kind of you to say that, but I thought the thrust of your statement to us, which is a valid thrust and one we have heard from other groups, and I might add, it will be the hallmark of this government--this sounds like a political announcement--that we have endeavoured, in reviewing and amending statutes, to take out of them the necessity for litigation, the necessity to bring in lawyers every time. My colleagues in the profession will probably kill me for this, but that will be the hallmark of this government.

Mr. Gillies: When did this start?

Mr. Mackenzie: It was not with this bill.

Mr. Gillies: Is this a new announcement?

Mr. Callahan: Do not pay any attention to those people. They do not know what they are talking about.

If you could get a definitive answer from a court under the Courts of Justice Act, I suggest you would eliminate a lot of this legal finagling at the board on both sides. If you adopt the proposal you have adopted, that of the steelworkers for a different wording, which I would suggest is different but not that much different, at least for a time--just as we are going to have under subsection 15(1) of the Charter of Rights--you are still going to have endless litigation until the Ontario Labour Relations Board comes down with a definitive statement or it goes to a higher court.

Mr. Taylor: The government does not have the intestinal fortitude to come out from behind the barn and say it like it is. Either you are going one way or the other. Either it is bad faith or something else. You will not say. You want to ride the two horses.

10:40 a.m.

Mr. Callahan: To respond to my colleague, we had guts at least to bring the legislation forward. We are prepared to put our position forward and--

Mr. Taylor: It is foolhardiness.

Mr. Callahan: --not have a divided caucus that cannot decide which way is up.

Interjections.

Mr. Callahan: In any event, I do not want to get terribly partisan.

That is all I really have to say. Even if the Legislature adopts the steelworkers' proposal, you are into the same situation. I suggest you have not resolved it.

Mr. Peacock: With respect, as the lawyers would say, the test is different. We do not want to have to go to a court to find out what the words in the bill, as it now reads, really mean. We want to ask this committee to write a bill that sets out whether there has to be a test, and heaven knows there already is a very particular test the parties have to meet. Our preference in the Ontario Labour Relations Act would be to have permission to strike the day after the collective agreement expires. We do not have that. We could not get it.

Mr. Callahan: That is a different issue, though.

Mr. Peacock: It is not a different issue because--

Mr. Callahan: That is the second collective agreement.

Mr. Peacock: Mr. Callahan called for the balancing of interests. In the act there is already a balancing of interest in the postponement of the unions' right to strike. The public interest is very much a factor in that balancing. Unions simply cannot go on strike in this province once the agreement runs out. We would like to be able to set that deadline and operate at the bargaining table against that deadline, but conciliation must be sought and completed.

What is wrong with that test? The ministry has said, "You are not going to have the test of having gone through conciliation." The officer reports to the minister. At the outset of these hearings, the minister described the process he goes through in authorizing the release of the no-board report. There is a very careful evaluation made at that stage as to whether the parties are going to succeed in reaching an agreement.

If the legislation requires us to go through one more hoop, surely the test should simply be whether or not the parties are likely to reach agreement. If that has to be determined by the Ontario Labour Relations Board, so be it, but write it in such a way that the decision of the board is protected from the courts. If the legislation says that in the opinion of the board the parties are unlikely to reach a collective agreement, you have a quasi-judicial decision to protect it from review. You move the process along. You do not get into the kind of stuff that we have just read about in the Visa strike. We had 16 days of picking over what one side said to the other. For heaven's sake, attempts were made to enter into evidence and argue who jostled whom on the picket line. Surely we do not want to bring the process of collective bargaining to that task.

Mr. Callahan: In the conciliator's viewing of the whole process, for instance, has that worked to this point? Has it assisted in arriving at a test of bad faith at the Ontario Labour Relations Board?

Mr. Peacock: It cannot be entered before the board. It is privileged. The parties cannot compel the attendance of the conciliator or the presentation of any notes the conciliation officer has made.

The board is even striving to avoid the use of direct evidence. It will take statements from the representative of the employer or the trade union as to what was said at the table. If it has to get into the content of bargaining, the board simply does not want and the legislation forbids using the conciliator as a witness to the findings. A labour relations board has the capacity, as a conciliation officer does, to ask the parties: "What are the issues? What have you done with those issues in the course of bargaining? You have gone through conciliation and there was some movement. You are at an impasse." Yes, we are at an impasse. What more is needed to move the parties to first agreement?

Mr. Callahan: In the event there were to be no amendments, at least to clause 40a(2)(a) through clause 40a(2)(d), would you consider that implementation would be better than nothing?

Mr. Pilkey: If they do that, we will oppose it most vehemently. Forget the god-damned legislation. We will continue the way we are.

Mr. Callahan: You have answered the question.

Mr. Pilkey: Forget it.

Mr. Taylor: Since the election, this is simply an exercise in party politics the way this section is now written.

Mr. Mackenzie: We do not need the worst of both worlds.

Mr. Pilkey: That is right. We may as well continue to struggle out on the streets.

Mr. Taylor: The test is still bad-faith bargaining.

Mr. Pilkey: It sure is.

Mr. Gillies: Without wishing to be partisan, is that the note we started on this morning?

Mr. Pilkey: Go ahead. I can understand that.

Mr. Gillies: I want to ask you a couple of questions about your feelings on the steelworkers' amendment, which you have included in your brief.

First, I assume what you are saying is that if you cannot get completely unfettered access, you will live with this; it is better than what is in the bill.

Mr. Pilkey: That is right.

Mr. Gillies: We are not doing it clause by clause for a while. I want to have a look at it, but I have a suspicion this amendment might be better than what is in here. As an individual member, I have an open mind on this, but I want to ask you--

Mr. Pierce: Which page is that on?

Mr. Gillies: It is the steelworker's amendment, on page 10.

Mr. Pilkey: It is page 10 of our submission.

Mr. Mackenzie: It would not necessarily go against the bill if we can get that changed.

Mr. Chairman: Are we going to get a legal opinion?

Mr. Gillies: There is one thing in here that we have talked about in the committee. I am looking at clause 40a(2)(b), and it is the same problem with subsection 40a(2) as in the bill. Is the onus on the board looking at the respondent? There is a feeling among some of us that it is sort of recriminatory. If the word "respondent" was out of there and replaced with "either party," would you have any problem, if the board, in considering clauses 40a(2)(a) to (d), looked at whether both parties had adopted fair and reasonable bargaining positions? At that point, it is not just looking at the other side. It is looking to make sure everybody is playing fair. Do you have any problem with that?

Mr. Callahan: It would be a show of clean hands.

Mr. Gillies: Yes, no fault.

10:50 a.m.

Mr. Pilkey: I appreciate where you are coming from. If you are looking at it from the unions' point of view, as an example, we put our position to the company. It is really not that position that is scrutinized. It is the response to it. That is what we are talking about here; that response is so negative.

In other words, and I will use this to illustrate a point, if we organized in a feeder plant to the auto industry, there are innumerable contracts out there that reflect suppliers to the industry. We would make proposals to that plant that track the industry. We are not going to do any pioneering on a first agreement. We are going to try to get things that reflect the suppliers' side of the auto industry.

If the response to that is much less than what we have in other agreements, then I think the board would have to say the respondent had failed to adopt a fair and reasonable bargaining position. I do not know why you would want to look particularly at the unions' proposals. In my view, they are somewhat irrelevant. What we need to look at is the response to the proposals. Does that make sense? Is that a tough bargaining position? If it is a tough bargaining position, we understand that and I am sure the board would understand that. It may be absolute nonsense, as some of them have been.

As a matter of fact, we go in there and Christ, they are coming back with concessions on a first contract. They are paying less than they were prior to the union. You know full well you are in for it in that case. The company does not even want a first agreement, and you usually end up with a long protracted strike. When you lose them, the whole question of the decertification process takes place. We are in a war. As I pointed out to you yesterday, some of those cases become a cause célèbre for the labour movement. Jesus, all hell breaks loose in those situations. You are mobilizing the whole labour movement around a strike.

I want to share with you the first one I was ever in, which was the Oshawa Times a number of years ago. It became a cause célèbre for the 34 people involved. Even the government saw fit to outlaw ex parte injunctions. That was the flow from the little strike that took place at the Oshawa Times. I will always remember it. That is what happens when we cannot reach a first agreement in these situations. They escalate. It is incredible how it happens, but it does. We ought to eliminate that. Damn it, we do not need that kind of thing in Ontario.

Mr. Gillies: All I was getting at with respect to this suggested change is that to be consistent with the kind of philosophy you put forward with regard to section 15, with which I completely agree, as I think most of us do, you want as much as possible to take that recriminatory, backbiting, "you did this, so we did that" element out of here.

Mr. Pilkey: Yes.

Mr. Gillies: While I do not have a great deal of experience in these matters in terms of bargaining, I wondered if removing the word "respondent" and putting in the words "either party" would put everybody on a level table.

The arbitrator can look at it and say, "You have put forward this position, but, on the other hand, perhaps you should not have asked for that." I am asking, perhaps a bit naively, whether that would be better.

Mr. Pilkey: Not at all, because it should not even be there. If you will allow us to go back a step, it is an invidious proposition that the board should be looking at these tests of fair and reasonable offers put out by one side or the other. Boards have always been reluctant to take a look at the content of bargaining, although they have had to look at it on occasion. In the Radio Shack situation, for instance, the content of the employer's position was a breach of section 15, the refusal to negotiate even a minimal union security provision of the checkoff.

There has to be a test and it has to be kept as simple and straightforward as possible. When this language was put before you on February 27, I am sure the aim the Steelworkers had in mind was to give the board the opportunity to make the simplest inquiry possible into the parties' position, as you suggest, rather than to try to find out who is to blame or who is at fault. I repeat that the real question is whether the parties are likely to succeed in getting agreement within the circumstances they bring to the board. If the answer is no, then public policy should not have any problems with moving to arbitration.

Mr. Callahan: That position has been put forward to us by at least one, if not two or three, chamber of commerce witnesses. I suppose it avoids the race to the board, where the first person at the board becomes the respondent. Under that section, the respondents have the onus cast upon them to convince the board that they have adopted a fair and reasonable bargaining position. All that is being said by making the test "either-or" is that you do not have this race for the first person to get there so as not to bear the onus. That is the reason for it.

In the light of that, do you see it as a reasonable position? I agree with you. As we have done with divorce, we have taken the question of who is right and who is wrong out of it; it is a question of determining fairness. That should be the test. In order to avoid the race to the board and one person bearing the onus of proof, would that not be reasonable?

Mr. Peacock: Something like that now operates in conciliation. Mr. Pathe described the process on the first day of hearings and had reduced the time track to a few days. In practice, it does not operate like that. If you make an application to the minister for conciliation the day after you receive your certificate, you are probably going to be refused conciliation because it will be clear to the ministry that you have not made the effort to bargain. The parties are sent back to the table and some time goes by. They have to show they have made the effort, and then the application is filed again.

I have certainly been in the position where the employer has rejected out of hand the proposal our side of the table has given them and said, "I cannot respond to this; it is preposterous." Is that going to get you through the gate into arbitration? Probably not. Even though the response has not been reasonable, it may be that my putting forward that proposition is what was unreasonable and the board can test that. The board can look at the original proposition put forward by the union and say: "That was preposterous. The employer may not have responded but the employer could not answer the bargaining demand put forward by the union." That does not happen very often.

Mr. Pilkey: Let us look at the reality. Usually when the union

submits its proposals, anything between them and the final conclusion is purely coincidental. They throw in everything but the kitchen sink, and I am being very candid. If somebody picked them up and said they were unreasonable, the reality is that the union is not married to those proposals. However, when employers say, "We are not going to give you anything more than you already have; that is it," or alternatively they are looking for concessions or cutbacks, you know full well they are not really responding to that.

We will find that out, too. The union will go back, look at its proposals again and start to cut them down a bit. If the company has not moved from its position--maybe not to where the union wants it, but at least into another arena--you know full well it does not really matter what the hell proposals you have for the company. They are in a position to destroy the union. They do not want a union in their place, so they have taken a very anti-union position: They want us to get ourselves in a position where we have to strike and they hope the organization will be decertified. They are taking us right down that road to where they want to take us.

If we did have a first agreement, they might find that the union does not have horns coming out of its head and they might be able to work with the organization. I think they would find out it is not a bad thing at all and work with the organization. However, that takes a little time; it does not happen overnight. That is why we are supporting the two-year proposition, as an example. If you looked at the proposals made by some unions, you would say they were outrageous. I remember Joe Davidson of the postal workers called for a 75 per cent increase. Everybody said: "Are they crazy? What are they talking about?"

Mr. D. R. Cooke: Are you saying that employers are more up front about it than unions?

Mr. Pilkey: Maybe.

11 a.m.

Mr. Callahan: To get back to the supplementary, Mr. Gillies is proposing something that was proposed by the chambers. It would read that, "The respondent and/or the applicant failed to adopt a fair, reasonable bargaining position" and avoid the rush to get into arbitration. You can appreciate that the person who is the respondent in that section, even as proposed by the Steelworkers, has the onus of proof because he is trying to prove something.

Mr. Gillies: This may not be the case in practical terms, Cliff. I do not know. My impression is that with this language it is a race, as Mr. Callahan said. If I can get my application in first, then the board has to consider whether the other guy screwed up. It becomes an incentive to get your digs in first, as opposed to taking a more reasonable position. If that incentive is removed, it becomes a case of whichever party puts it before the board, they are going to be looking at both positions.

Mr. O'Flynn: There seems to me to be a presumption here that there is an imbalance in favour of the employees in the act.

Mr. Callahan: We are not suggesting that.

Mr. Gillies: I did not mean to suggest that.

Mr. O'Flynn: I want to make the opposite point, that there is an imbalance and the balance at the moment favours the employer. If you look at the back of this brief, you will see the numbers and the size of the bargaining units that are in first-contract strikes and disagreements. Most of those units are very small. It is very difficult for workers to organize themselves so they can claim for themselves their rights under the Ontario Labour Relations Act.

The power of the employer is so pervasive that the employees cannot get their rights. They cannot claim them; they cannot use them. The employer says: "No, go to hell. We are not going to give you a collective agreement under any circumstances." They do not say it like that because they know that would be bargaining in bad faith, but they act that way.

Mr. Callahan: That was not the question we were addressing, but I appreciate what you are saying. That is not necessarily as--

Mr. Pilkey: Let me answer this one. Leave that one with us and we will respond to it in writing to the committee.

Mr. Gillies: Okay. I thank you for that.

I have one last question. The labour movement has been reasonably united in coming before this committee on most points in the bill, with one point in exception that I will ask you to clarify. The last thing any of us want is to be accused of misquoting you in the future.

Most of the individual unions that have come forward have left the bottom line that they would still rather have this as it is worded than the status quo. One other individual union and now the Ontario Federation of Labour have said to the committee that they would rather have nothing than this. I want to be absolutely clear that is your strongly held feeling.

Mr. Pilkey: Yes. No question about it. If we have to tell Mr. Wrye and Mr. Peterson, we will do that too. Forget it. We will continue the fight out on the street; to hell with it. There is no sense in us going through that. Either we get some decent legislation that responds to a very critical problem that has existed out there for a long time, or we might as well continue on two fronts: first, on the street; and second, continue to go after the Legislature to provide a decent piece of legislation. We will keep up that fight to get them to respond.

There is no use having a piece of legislation that is cosmetic in nature in terms of the access, and that is exactly what this is, my friend. I am not suggesting there are no points in the legislation that are good, but on the access part of it, it is too difficult a test. I am not a lawyer, my friend, and I have to consult with people from your profession. I am told that a number of them sat around and said that in the Eaton situation under this legislation, as opposed to bad-faith bargaining, the end result would have been exactly the same.

If that is true, we might as well continue to try to advance legislation that is more in line with an attempt to resolve those first-agreement problems and also continue the struggle on the street.

Mr. Gillies: In conclusion, tongue in cheek, I might say you are really supporting the Progressive Conservative position on this bill. We voted against it. We do not think it is a good piece of legislation and now we are

trying to improve it. The Liberals and New Democrats are so out to lunch on this bill that they even supported the first draft which you agree with us is absolutely--

Mr. O'Flynn: We hope you will vote for automatic access. You will find the NDP will support that and we will have no problem.

Mr. Gillies: I am just being provocative.

Mr. Chairman: The other way of putting it is that the PCs want direct action out on the streets.

Mr. Taylor: Following up on this, Mr. Pilkey, on page 3 of your brief, you mention the role of the federation and its submission of brief after brief to successive Premiers, cabinets and Ministers of Labour, on the need to follow other Canadian provinces and the federal parliament. I presume that is in the implementation of first-contract legislation. Is that correct?

Mr. Pilkey: Right.

Mr. Taylor: Could you indicate the extent of that time frame in terms of your lobby for this legislation?

Mr. Peacock: Yes. One of the earliest mentions of it in a formal way was in the 1979 submission of the federation to the then Minister of Labour, Mr. Elgie. It was part of a submission that covered a number of issues we were seeking to change in the Labour Relations Act.

Mr. Taylor: It would be from 1979 on.

Mr. Peacock: It was raised prior to that. When you go back to strikes such as Tilco Plastics and the Oshawa Times, we had some struggles in the labour movement with the concept of first-agreement arbitration. Despite what Mr. Armstrong has said, it was not something we could embrace very easily, because we do not think a third party settles an agreement as well as the parties themselves.

Mr. O'Flynn has been through that in his term as president of the Ontario Public Service Employees Union and knows full well what you often get at the hands of an arbitrator. No one knows the work place and the way an agreement has to be shaped better than the parties themselves do. It was through the experience of those very bitter strikes that we came to the conclusion that this is where we had to go.

Mr. Taylor: In those submissions, did you indicate with any certitude the nature of the amendment? What I am grasping for here is whether the type of amendment that would be necessary to implement your submission was made clear. It is obvious from what you have said that this amendment does not do that. I am wondering how clear your position was made. I will follow up with whether any subsequent meetings with the present minister clarified your position in this regard.

11:10 a.m.

Mr. Peacock: To answer the first part of your question, not in the detail you see here today, but we left the Ministers of Labour in no doubt that if you sign a union membership application card, you get to sign a collective agreement, as B follows A.

That is what this Labour Relations Act is all about. It is not about whether the one party has the strength to win over the other and sign an agreement or not sign an agreement. If the submission has been made to you, and I am told it has been--I have not been able to check the record--one side or the other can bargain towards a no-contract result. That is not the case in this Labour Relations Act. That is a breach of section 15.

You cannot bargain towards a no-contract result in Ontario. You must put your mind to bargaining a collective agreement. The preamble says it, section 15 says it and case after case at the board has said it. You may take a very hard position, as Eaton's and other employers have done, and you may wind up getting an agreement on your terms, but you must bargain towards an agreement. That is what we say has to be accomplished by this amendment.

Mr. Callahan: You are saying we have developed first-contract legislation because delay goes on and in the meantime the union can be decertified. That is the backdoor approach.

Mr. Taylor: It strikes me that the legislation is somewhat hypocritical as currently drafted, in that it seems to embrace the concept of a mandated first contract. However, when you seek access to that, it is dissipated in very vague language that is tantamount to bad-faith bargaining. We end up with a legislative exercise in optics rather than an expression of goodwill in terms of your submissions. I do not know whether that is fair comment, but it strikes me as the end result.

Mr. D. R. Cooke: I think not.

Mr. Pilkey: I do not know whether it is a fair comment, Mr. Taylor, but I hope someone has it recorded. Anyway, if I can respond to when this thing came about, Mr. Peacock is absolutely right; I can assure you it was before 1979. It may be the first time our position appeared in writing some place. I remember some very long, tough debates on the question of whether we should go down that road. There were many who thought, "The moment we get first-agreement legislation, what follows is we get compulsory arbitration and there will be complete erosion of the collective bargaining process." That was the fear and it may be legitimate.

In any event, we are prepared to take our chances. That is my argument with those people who say we are destroying the collective-bargaining process, those champions who never were in the labour movement in their lives. We are prepared to take our chances on that, but we need to have decent first-agreement legislation, not something that pretends we have it when we do not. We do not need that.

Mr. Taylor: I am reading from what you are saying that you are making a sawoff in this legislation because you are really compromising a position of negotiated settlements, and that is that, as opposed to the introduction of the new concept of a mandated settlement that has really been foreign to the process.

Mr. Peacock: It is just like being at the table, Mr. Taylor. The government is the employer and says: "This is what you are going to get. We are here making our offer or our proposal and you are the mediator. You are going to have considerable influence on what we wind up getting out of this process." In the political arena, it is no less a matter of negotiation.

Mr. O'Flynn: I would like to keep it simple so that you do not

transport all the problems to the Ontario Labour Relations Board, which will result in it becoming a greater legal bureaucracy than it is already. The things it has to adjudicate on should be simple so it does not have to spend weeks hearing evidence to decide which way it is going to come down.

Mr. Taylor: I appreciate the minefields implicit in the section as currently drawn.

Mr. Peacock: Please ask your staff to take you through the Visa centre decision of the Canada Labour Relations Board and you will see what the board in Ontario and the parties are in for if this language of subsection 2 stands.

Mr. Taylor: Mr. Pilkey, would you care to amplify the dangers fraught in the acceptance of the legislation in terms of the adoption of the concept of imposed arbitration? Is this the thin edge of the wedge? Are there elements that really had to be balanced before you came down on the side of an imposed settlement?

Mr. Pilkey: There certainly were. We had vehemently opposed compulsory arbitration. As you pointed out, this is between the parties, not some third element in the process. We do not want to go that route at all, but in this case of a first agreement we came to the conclusion that there was no other route to go. Because of the problems that existed in some very difficult talks that took place, we said, "Let us advance that as a proposition that needs to be legislated." If you flip the coin over, we have said historically that all workers should have the right to strike and be able to take economic sanctions against their employer.

You and I know that is not the case. There are groups of workers in this province who do not have the right to take any economic sanctions at all. We also know that by going that route some have benefited but the vast majority have not benefited.

I will give you an illustration of what I am talking about. Go to the contracts that municipal government employees have got through the years and bounce that off against the hospital workers. The municipal workers made more progress through the free-collective-bargaining process than the hospital workers have done through the Hospitals Labour Disputes Arbitration Act.

One can say, "That is very nice, but let us look at the police and firemen." It is true they have done much better through that process, but they are a smaller group than the others and somehow we need them in society. You close down a hospital and all hell breaks loose with the general public, but they are not paying the people in terms of the service they provide. They are not prepared to do that. They say it is awfully essential that we have those hospital workers in there, that we have to look after care for the physically handicapped, the sick and everyone else, but they are not paying them. If they had free-collective-bargaining rights, they would be paid decent compensation for the work they do, but they are being held back.

The point I am trying to make is that we are on the side of free collective bargaining. Do not let anyone tell you that because we are calling for first-agreement legislation, somehow we want to inhibit that. All we want to do is get over the first hurdle because it has been so difficult and so tough with the protracted strikes and difficult litigation that go on. If it does not run counter, my friend, to the Labour Relations Act, it certainly does in spirit. When you read the preamble of that act that talks about

harmonious relationship between the parties--that is what it says--then something has to change to provide that, particularly on first agreements because the present legislation, Mr. Taylor, violates the spirit of that act.

Mr. Taylor: Mr. Chairman, have I time to address--

Mr. Chairman: Mr. Pierce has been--

11:20 a.m.

Mr. Taylor: I am sorry. While I am on the subject, can I address a question to the point of access? The concept is not to do away with the ordinary process of negotiation, and of strike if necessary.

Mr. Pilkey: Right.

Mr. Taylor: Do you see the legislation as a vehicle that in most cases would eliminate the strike process, or do you see it coming in after a strike has not accomplished very much and then plugging into the process under the legislation to bring about arbitration? In other words, as a normal approach, would you exhaust the existing remedies, including strike, before accessing mandated arbitration?

Mr. Pilkey: It is not necessary to have a strike, but I think we ought to go through the process of collective bargaining. It does not necessarily have to end up with a strike, and if it does, it ought not to be a long protracted one before you can access the legislation.

I have been in this movement for a long time and I have seen the poisoned relationships that have taken place as a result of long protracted strikes, particularly on first agreements. Even when you are able finally to bring them to the point where you get an agreement, the relationship inside the plant between the employees and the management is god-damned cool and cold. That has to reflect on the company too.

Mr. Taylor: The reason I raise this point is that it has been said the vehicle for arbitration might eliminate some or all of the normal process, so that you would jump straight to--

Mr. Pilkey: I violently disagree with that. I think what they are saying is damn nonsense. The trade union movement wants to negotiate collective-bargaining agreements, whether they are first, second, third, fourth or fifth; we want to negotiate an agreement. We do not want to go through some process we exercise without going through the collective-bargaining process.

We have no faith and no confidence we are going to get a big deal on first agreements from a third party. We have had experience with third parties. We are not going to get it that way; we are going to get it through the collective-bargaining process. What we are saying is there are a number of occasions on first agreements where you cannot even get a collective-bargaining agreement of any kind or description. That ends up in a long protracted strike or decertification.

We do not want to eliminate, in any sense of the word, the process or abuse the process. Let me give you an illustration of abuse. God, I remember this quite vividly. I think it was Bill 39. It was on occupational health and safety. What I am going to say is a perfect analogy. God, I remember the employers at those meetings--

Mr. Peacock: Right in this room.

Mr. Pilkey: Right in this room, and in northern Ontario when I was there. Every employer was in here saying: "The moment you give them the right to refuse in the legislation, they are going to abuse it. We are going to have all kinds of problems in the plants and the enterprises, and it will not have anything to do with occupational health and safety. It will have a hell of a lot to do with other things. They will use the right to refuse to get their ends."

What has happened? The reality is it has not been abused at all. The facts are that even today when you talk to the employers who were so vehemently opposed to that, they say: "You were right, Cliff. It did not happen."

Mr. Taylor, I am suggesting that if this legislation gets put in place there will be no abuses of it either, that they will only use it when it is absolutely essential to get a collective-bargaining agreement. They will make a substantial effort to do that through the collective bargaining process and not through the legislation. I think they could do much better if they could get an agreement through the normal process, as opposed to going this route.

Mr. Pierce: Most of my questions have been answered, but the main question I had was the one Mr. Taylor just asked. I have asked that question on occasion of other representatives before us, that is, whether first-contract arbitration would come into effect prior to either a lockout or a strike.

As you have indicated in many instances today, the attitude towards good collective bargaining is a harmonious relationship between the two parties. We know that breakdown happens very quickly in a first-contract strike. You are dealing with a 55-45 split in many cases. Fifty-five per cent of the employees have signed certification cards and 45 per cent, for reasons only they know, have refused to sign cards or have not signed them, so there is an automatic split in the bargaining unit.

Mr. Peacock: We will be back on that one.

Mr. Pierce: It would be great if you were required and could get 75 per cent of the employees to sign the certification cards. You would be going in with a much stronger bargaining unit and much more power than you are with 55 per cent.

Mr. Peacock: Absolutely.

Mr. Pierce: Somebody along the road has got it down to 55 per cent. I suppose some day we will end up with 51 per cent, one more than half.

Mr. Peacock: If Mr. Pathe or Mr. Armstrong returns to your committee, I think you will find that the applications go in with substantially more than 55 per cent, on average. It is very likely Mr. Gillies would have seen that during his term.

Once when I was a member of the House and Dalton Bales was the Minister of Labour, he came in and said, "We are going to make it 65 per cent." I asked, "Why is the minister raising it from 55 to 65?" He said, "Most of the applications are coming in with well above 65 per cent."

Not long before that, the Minister of Transportation and Communications had stood up and said, "We are going to raise the speed limit on Highway 401," which had not long been open across the province. I forget the mileage. I guess it was from 60 to 70. I cannot think of miles any more.

We asked, "Why are you raising it from 60 to 70?" He said, "We find that 20 per cent of the drivers are exceeding the limit now; so we will raise it another 10 miles an hour." Maybe the Minister of Labour went through the same thinking to get the applications for certification up by another 10 per cent.

Mr. Taylor: You could bring down the number of lawbreakers anyway.

Mr. Callahan: I wish somebody could do that with the dollar.

Mr. Peacock: That was not in too long.

Mr. Pierce: Let us get back to the subject.

Mr. Peacock: It came back down to 55.

Mr. Gillies: Those were the days.

Mr. Peacock: You will find that if a union is trying to put the icing on the cake by making an application to the board and calculating, "If we start a strike or are about to go on strike, let us see what we can get out of the arbitration process under this bill," the board is not going to give it access. The board will say, "If you are that close to a settlement, go back and do it on your own." The union in that situation will not get access just to win what we would call the icing on the cake. It is not going to go on strike either for that marginal difference at the end of the process. It will look at what is on the table and say, "We will settle."

Mr. Pierce: What I am saying is that when you are at that point of no return, it is strike now, lock out now by the employer or first-contract arbitration. Do you see first-contract arbitration coming into effect prior to the lockout or the strike actually happening?

Mr. Peacock: Certainly. If there is a fundamental issue at stake and the union does not have the strength to strike the employer or the employer does not have the ability to take a strike, one side or the other will make the application to avoid the strike.

Mr. Pierce: One of the comments we got the other day was, "We have to have the strike because everybody has to hurt a little bit before we are going to come to a conclusion."

Mr. Pilkey: Is that not great?

Mr. Pierce: That is an awful attitude in the process of collective bargaining, as far as I am concerned.

11:30 a.m.

Mr. O'Flynn: One of the issues I saw in a first agreement, the issue on which there was a strike, was that the employer insisted that the grievance procedure should not apply to anyone being dismissed. The employer should have the right to dismiss anyone, provided it peddled him off at a certain rate. The union would not sign. No self-respecting union would sign such a

collective agreement. They had a strike. There were about 15 employees. It collapsed after a couple of weeks.

The union went to the board and asked for a declaration that this was bargaining in bad faith. The employer said, "We were prepared to sign the collective agreement with that provision in it." The board was faced with the decision, is that bargaining in bad faith or not? Those are the kinds of issues that first-contract agreements hang up on.

Mr. Mackenzie: I think it is worth going back just for a second to the case Mr. Taylor made. He has made it before, and I have never responded to it, namely, whether or not, fundamentally, you are changing a position of not agreeing with compulsory arbitration.

Speaking from a personal perspective, that has been my position and a very strong one. I have had real reservations about compulsory arbitration. They might have been a little less if I had come through the public sector, but I did not. It was the industrial sector that I came through. I have been the Labour critic for this caucus of ours since 1977. We had them before then, and I think it was about then that we first started really hearing about the possibility of first-contract legislation from the labour movement. I do not think I endorsed the concept myself until about four or five years ago.

I guess I did because of two or three things. First, I think we have to learn from experience and what goes on. Second, I saw damage being done, not only to the rights of workers but also to the public good. If an employer made up his mind that was the route he was going, I saw not only the inability of the workers to get a contract and to achieve what the Labour Relations Act preamble says should happen, but also a real danger to the public good.

I may have made reference to one or two cases. I have been on picket lines and have had some small involvement in some of these first-contract disputes. The destruction of faith in our system hurts, particularly when there are a lot of women or ethnic people in new plants. I am telling you the truth when I say I have had women on a picket line in a nasty first-contract situations start screaming and swearing at the police and then break down in sobs, saying that never in their lives had they done that before and never did they expect they would be saying something like that. The system had literally failed them.

They saw the use of force the company could muster. They saw the use of security guards. They saw the use of police. They saw their inability to get a first agreement, in spite of what was an obvious management position. I think we were not only doing damage to the rights of workers, but also we were risking our whole belief or faith in our ability to come up with a system that deals with these kinds of situations.

I admit it is a small number of cases, but when you start threatening the public good as well as the rights of the workers--and I guess the two are intertwined--then I think it is time your position has to switch a bit. I will admit in my case it was pretty adamant.

Mr. Taylor: It is nice to see you mellow, Bob.

Mr. Mackenzie: It is not a question of mellowing. I still think the argument we have been given basically by the union people--and I do not think they have really been fully destroyed even by the management people--is that it does not make a hell of a lot of sense to try to settle it through a

third-party arbitrator. There are those situations, and we have not been able to deal with them. We have sure as hell raised them over the last few years, with the previous government and this one, and we have not been able to come up with a method of dealing with them.

I think this offers us the opportunity. Sure, we are going to have to live with it and find out. Maybe we will regret it. I do not happen to think so. Surely to goodness, do not give us a bill--and I guess this is my final plea to all members in this committee--that gives us the worst of both worlds. Give us a bill that does allow the access. Otherwise, what the hell are we doing with an issue that has caused a hell of a lot of hardship and really polarized some situations across this province?

Mr. D. R. Cooke: I am just absorbing this love-in situation between the Progressive Conservative Party and big labour.

Mr. Taylor: That may be your interpretation of events.

Mr. D. R. Cooke: That is what I am trying to understand. I want to know from Mr. Taylor whether he agrees with Mr. Gillies that subsection 40a(2) does not go far enough. I take it that is the position of Mr. Gillies, and he said he was speaking for the whole PC Party. Is that the reason the PC Party voted against this legislation?

Mr. Taylor: Just a minute now. I have never been accused of lack of candour, to start off with, but I do not think this is the forum for you to be interrogating members of the Legislature. Our party, as you know, voted against the legislation and we have been historically consistent in that.

Mr. D. R. Cooke: We are down here to find out why you did.

Mr. Chairman: Mr. Cooke, when we get to the clause-by-clause debate, it will be a very interesting time to raise those kinds of questions.

Mr. D. R. Cooke: I just got excited when I heard Mr. Taylor talking about hypocrisy.

Mr. Chairman: Are there any other questions or comments by members? If not, Mr. Peacock, Mr. Pilkey and Mr. O'Flynn, thank you very much for appearing before the committee. You have obviously provoked members, their interest at least--

Mr. Peacock: I hope we have assisted them too.

Mr. Chairman: --and I hope that you have assisted us too. Thank you very much.

Mr. Peacock: In that respect, may I leave with you a copy of the Canada Labour Relations Board decision on the Commerce Visa centre settlement?

Mr. Chairman: Thank you.

Mr. Pilkey: Mr. Chairman, I want to thank you for the opportunity to make a presentation to the committee. We see this as a very important step in the whole field of labour relations in Ontario and we are very happy that we had the opportunity to make a presentation here this morning. Thank you.

Mr. Chairman: Thank you. The committee is recessed until 12 noon.

The committee recessed at 11:40 a.m.

12:08 p.m.

Mr. Chairman: The standing committee on resources development will come to order. We have with us now the Retail, Wholesale and Department Store Union. Welcome. Mr. Collins, we would be pleased if you would introduce your delegation and proceed.

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION

Mr. Collins: I have with me James K. Hayes, our counsel. Paul Kessig to my left is a business agent with the union and formerly was an employee of the Eaton's in St. Catharines. On my far left is Lynn Carson, who is a bargaining unit member at the Scarborough Eaton's store and is an employee of Eaton's at the moment.

I am sure you have heard from a number of groups as to their desires concerning this bill and their reasons for amendments to it. First and foremost, we applaud the fact that consideration is being given to a bill of this nature. Some have referred to it as the Eaton's bill because the large and rather public dispute the Retail, Wholesale and Department Store Union had with Eaton's carried with it many of the reasons why we need legislation of this type.

We are here today not to give you specific amendments but to talk about the history, as we understand it, and to give you some outline of what happened in a particular dispute, the Eaton's situation. From my point of view, I supervised the negotiations for the union through the negotiating of all those collective agreements and I was a party, along with Mr. Hayes, our counsel, to all the problems and decisions that had to be made in that set of negotiations.

Our union in Ontario represents some 20,000 employees in a large number of small operations in the service industry, the retail industry and the wholesale industry. On many occasions, we have gone through first-collective-agreement strikes. We have had some long strikes and what a lot of people perhaps would consider in a lot of ways to be far less significant disputes than the Eaton's situation. Over the past couple of years, we have probably had eight or 10 strikes caused by impasses in bargaining or an inability to get any kind of collective agreement with certain employers.

In the Eatons' situation, I may be recounting things you already know as a result of press accounts of these issues, but I want to give you a view from our perspective. In spring 1984, there was a substantial organizing campaign at the Eaton's company and other department stores in Ontario. This effort came about not by planning but by accident; that is, all of a sudden people showed an interest in the Eaton's company. As you will recall, there was the historic element of the Brampton Eaton's store being organized during a period of eight days by some 85 per cent of the employees. There was an overwhelming desire, surprisingly enough to us, on the part of a number of employees to join the union.

That blossomed over a period of about three months into 14 separate, successful certification applications before the board covering six stores. In virtually all, in most of those applications, the percentages of membership evidence that the union placed before the board were in the ranges of 80 per

cent, 85 per cent and 90 per cent, a situation very different from most that we face when we are getting certified at companies. There was overwhelming support. There were no petitions against the union in any of the applications. There was no contest in those terms. Subsequent to that, we had a number of other applications; we lost some votes and that sort of thing.

Once certified, we gave the company notice to bargain and commenced bargaining with it in May 1984. It was the position of the union with the company that we would attempt to facilitate the bargaining process by getting the company to agree to consolidate and bargain at one table, either for one collective agreement or for a number of them, but at least to set up the negotiations so they were manageable.

The idea of negotiating 14 collective agreements with one company at one time puts a number of time constraints on the negotiating process. We knew they were there and we attempted to get the company's agreement to that procedure. We were under no illusion about it being a difficult exercise. We were aware of the counsel for the company and the type of strategies it had developed in other sets of negotiations with us. It was the position of the company and its method of bargaining that it requested meeting at six separate stores in proceeding to try to negotiate a collective agreement.

We submitted an identical collective agreement for all 14 bargaining units that was endorsed by the employees. We proceeded to meet in an attempt to negotiate, starting with the Brampton Eaton's store, which was the first to be certified. At those first meetings, the employer had its own bargaining team with the labour relations director of the company who sat in on all but one of the negotiations and directed all of them to the extent that there was very little discussion for any other members of his committee.

In the practical sense of negotiating, I went through an exercise I had not gone through anywhere else with respect to attempts to talk us to death. For the first two meetings at the Brampton store, we reviewed our proposals for the company. With a list of questions in front of them, they systematically questioned us on every individual proposal put forward. We responded to them; that took approximately two days.

They then came back for approximately another three days to review their verbal summary of what we had done. They then proceeded in each individual set of negotiations to do identically the same thing they had done in the first set of negotiations: the same questions to the same people to frustrate the process. "Frustrate the process" is our term. The repetition occurred for approximately 13 bargaining sessions during a period that spanned five months. During that whole period and up until the five months was exhausted, at no time did we have any written response from the company on anything. At that point, it was evident to us that bargaining in the sense we have known it was not going to occur.

We applied for conciliation to get some help from the ministry. The company attempted the same process through our conciliation meetings. It was not until we reached conciliation that we got any kind of written proposal from the company. The types of issues that were on the table were ones we had understood were, for all intents and purposes, illegal. The company attempted in some instances to change the certificates we had been granted. At no time prior to the strike at Eaton's did we get any wage schedules or classifications from the company. In effect, it would have been impossible to settle a collective agreement without those things. It was not until two and a

half months into the strike that we received any proposal on wages or classifications from the company. The board noted that fact in its decisions, but suggested that because they did come that was fine, even though they were late.

Throughout the negotiations the position the company took, spoke out on many times and reaffirmed in its testimony before the Ontario Labour Relations Board on bad-faith bargaining charges was that it was going to give no greater benefits to unionized employees than to nonunion employees. We took all that to the Ontario Labour Relations Board with bad-faith bargaining charges to try to show there was no way in the whole process that the company was going to give us a collective agreement at that time, with issues we understood were illegal.

There was the evidence of our repetitive meetings, our repetitive discussions and our inability to get a written proposal from the company. When we did, a number of things were missing that we had understood they were required by law to give us. With all that before the board, it still found there was no bad-faith bargaining. We had charged in several instances that they had frustrated the process and the board found they had not frustrated the process.

It became clear at about that time in the negotiations that there was a decision laid down by the board in the Canada Trustco case regarding bad-faith bargaining, that the entire set of negotiations at Eaton's had been patterned after the set of negotiations at Canada Trustco, and that what was in front of us was a systematic attempt to frustrate any ability to get a collective agreement. That was condoned by the board in the Canada Trustco decision. Therefore, I presume they assumed it would be condoned in the Eaton's negotiations as well.

At the point we went on strike, there were a number of outstanding issues, including clauses on the table from the company that the board found to be basically illegal; that is, that our members had no right to solicit membership on the premises of the company. However, in reviewing all that, the board found that all we were talking about was hard bargaining, that the company was not frustrating the process and that there was no bad-faith bargaining involved in these issues.

Out of all of those discussions came much of the publicity surrounding a desire for first-contract legislation. It was difficult for us to prove before the board that there was no way we were going to get a collective agreement from Eaton's.

The company took the position, even before the board, that it did not want to give anything to the union employees that the nonunion employees did not have. They got a successful decision from that board. We were ultimately forced to sign the collective agreement that was there and to put the people back to work. The irony of it all is that now we are back before the Ontario Labour Relations Board with charges, because starting some three months after we resolved that collective agreement, the company started to implement wage increases over and above the union contract to the nonunionized stores on seven different occasions. The position they had taken with us throughout the issue was, "We are not going to give you any more." Now we are in a position where more has been implemented throughout the company. The motivation of the company is evident; at least it was evident to us when these activities occurred.

On the settlement itself, some hard and fast decisions had to be made by the union and by the employees out on strike. There was an attempt to freeze us out beyond the six-month period. With the hiring of new employees in the stores and that sort of thing, it was our view that it was the intention of the company to go beyond the six months, get rid of the union and get rid of the employees as well. The employees made a decision to go back to work. We ratified the collective agreement and we put them back to work.

The point of this discussion is that we saw two areas in the bargaining with Eaton's that, with the proposals you have in the bill, are of particular concern to us. First, there were tremendous time delays as a result of all the litigation we had to go through to prove bad-faith bargaining or to get any meetings with the company. Any system that is set up for first-contract arbitration that does not eliminate or tremendously reduce the opportunity for one side or the other to stall is going to be of little use to those of us caught in situations such as the one with Eaton's.

As I have indicated, in the bad-faith bargaining charges, we continually charged the company with trying to frustrate the process. You have used such terms in the bill. If such terms end up in the final version of the bill, I really doubt they are going to be of any use to us. If we could not prove it in the Eaton's case, we will not be able to prove it anywhere.

12:20 p.m.

We need some kind of free access to an arbitration procedure. In negotiations such as those in the Eaton's case, where a whole new industry is being organized, we can expect without fail that we are going to have a large and significant dispute. If there are no alternatives for a group of employees who have sitting in front of them a collective agreement that has no wage schedules and classifications, has some illegal clauses and has alterations of the certificate that are not supposed to be brought to impasse by either the company or the union, what else is a group of employees or a union supposed to do other than to have a strike? When faced with those circumstances and without the free right of access to an alternative, there will be no alternatives but strikes.

It is certainly a more difficult situation to deal with if, even faced with a strike, you have to litigate for months to gain access to that procedure. Eaton's was skilled at keeping us through days of hearings before the board on all these issues.

I can say from the personal position of having been in charge of that set of negotiations that had we had the option of access to first-contract arbitration, we would have chosen it. There was no illusion on the part of the union or the employees concerned that the strike action was somehow going to produce miraculous results in terms of a good, new collective agreement. We knew exactly what was happening. We were forced into those circumstances and in a lot of ways we knew what the eventual outcome would be, that if there were going to be any kind of collective agreement, we had to take the thing the full tilt in the hope that we would get some action by the Ontario Labour Relations Board on the bad-faith bargaining charges, or in the hope we would get some help from the public in coming to some reasonable and decent terms in the collective agreement.

Anyone who is familiar with labour relations and collective agreements only has to look at the final collective agreement draft at Eaton's--and it is something we swallowed--to see that agreement is nowhere near the standards of

any industry at this time. It contains in it such novel ideas as the public image of employees being a factor in whether they get jobs and that sort of thing. We need an alternative system in these circumstances.

We have a few short personal comments. I have brought employees to give you a personal reaction. They went through this for the first time. As professionals, we do it as a matter of living, but both the individuals here with me went through this exercise for the first time after having some common sense notions about what they were doing. They had quite a surprise. I will turn it over first to Lynn Carson for some comments.

Mrs. Carson: Workers decide to join a union due to poor communication, unfair treatment and working conditions and the inability to challenge management decisions affecting the work place. The decision to go on strike arises when negotiations that have gone on for some months prove an exercise in futility. What alternative is there when a company does not want a union? They refuse to budge from their original position when negotiations begin, knowing full well that six months down the road, without a first contract, the employees will no longer have their jobs and the union will be busted. As a woman who personally participated in a long and bitter strike for a first contract, I can tell you that walking a picket line in the dead of winter was no picnic.

First-contract legislation is needed in this province to protect workers from the likes of such companies, but having to prove bad-faith bargaining on the part of a company legally leaves that company holding all the cards and the employees with nothing. I would like to see legislation that would impose a first contract for a two-year term on parties when negotiations have totally broken down and working through conciliation proves the parties to be at a complete impasse. This legislation is too late to help us but fair legislation will help restore our faith in the promise of Ontario. It has long given us a place to stand; it now has the opportunity to give us a place where we can truly grow. It is long overdue.

Mr. Kessig: I was an employee of Eaton's up to August 1, 1985. I am now a working staff member of the Retail, Wholesale and Department Store Union, but two years ago I myself and the rest of the employees were not political or unionists, nor did we even know what the terms basically meant. We did our voting and it was an off-the-cuff thing. But we did recognize injustice and inequality in the store and we had been trying to change it internally but could never get anywhere.

An example is a man can sell suits and make \$30,000 a year and a woman can sell ladies suits and be lucky to make \$12,500 because they will not do anything about this type of situation. Again, that is neither here nor there.

When we brought in the union and it became certified by a majority, we were optimistic that things could change. We felt we would be dealing with a mature attitude from the company. Even though we did not expect anything to be a piece of cake, we thought we would be able to get along and things would improve. We were full of hope in this case.

When we got to the table we realized that, bang, the first two or three sessions told the tale, and that is where it was. We were shocked; we just could not accept this fact. We had read the Labour Relations Act. We saw what the law stated and how it was supposed to be. The preamble talked about harmonious relations between the employer and employees. The government was

saying to us that this was the way it should be, but we were not seeing any of this fall into line whatsoever.

We went along with the process with hope in our hearts that things would change. We went for the conciliation aspect. When things turned bad, we realized that things were not going well. We thought the bad-faith bargaining charge was a hope that would help us. We ended up on strike.

Believe me, when you see women in their 40s, 50s and 60s out there with the ice forming against their backs and they look like statues, it is something else. When you know that women are out there shovelling sidewalks to put food on the table, that was one end of the spectrum. On the other, you had people in better situations who were giving all their strike pay back in to help those who did not have it. There was a lot of that going on, too. I could go on for hours on that, but I will not.

When the mediation process came along, we thought, "Gee, according to the Labour Relations Act, maybe things will improve in this situation." Then came the blow that hurt all of us deeply. This was the result of the bad-faith bargaining charges given in the decision by Mr. Springate. What really hurt--and I mean this sincerely--was when he made reference to putting aside a moral issue, putting aside a fairness issue, that there was only hard bargaining, not bad-faith bargaining.

I was always led to believe that bargaining in general was a moral issue, a fairness issue. How you could take those two parts out of it and leave this hard-bargaining attitude I still do not understand to this day, and to this day I, along with the other employees, do not accept it, either.

There is no need for suffering to this extent, and if legislation had been in place to eliminate this and to bring the parties together, it would have prevented an awful lot of suffering.

We went back to work to save our jobs, and to save our jobs only. One thing I want to make very clear is the fact that the employees do not consider that they have even a first contract. They accepted a piece of paper to save their jobs and nothing more. We are still waiting for our first contract. I realize this will have nothing to do with that, but in our hearts and minds that is where we are coming from. We just got our jobs back; we did not get any more. As far as I am concerned, we look at all types of justice presented right now with a bit of a jaundiced eye and we are as sceptical as we were two years ago.

I hope that with proper legislation, first-contract legislation, this can change and nobody else, as Lynn says, will have to go through what we have gone through. That is what I personally feel about it, and I thank you for your time.

Mr. Chairman: Thank you, Mr. Kessig. Is there anyone else?

Mr. Collins: I will turn it over to our counsel.

12:30 p.m.

Mr. Hayes: Mr. Chairman and members, I would like to make a few comments. I know that you are gathered at the end of a long process and that many of the comments I will make will have been heard before, but I will make them as brief as I can.

I speak to you as someone who has acted as counsel for this union throughout the entire Eaton's dispute, but I also speak to you as someone who has acted through the bad-faith bargaining cases at Radio Shack, Fotomat and Irwin Toy. More recently, I myself and members of my firm have been acting at Super Plastics and Graham Cable. All of these names have been repeated from time to time during the course of these hearings.

During the last eight years I have dealt with employees in all of those disputes and have seen the avoidable suffering of persons who were dragged out on strike, in heat and in cold, in disputes that should never have gone that far. Some of those disputes have happy, somewhat happy or partly happy endings; in others the story is yet to be told.

Perhaps I could put in context, from a lawyer's point of view, some of the real concerns of the trade union movement are about access. As you have all learned long before now, it is very difficult to prove hard bargaining, which the board says is lawful, and to distinguish it from surface bargaining, which the board says is unlawful.

It is fair to say that in the last couple of years the Canada Trust and Eaton's cases--and, more recently, another Radio Shack case--are illustrative of the board taking what would be described as a more laissez-faire approach than it had taken a few years before that.

While the board says that theoretically surface bargaining is illegal bargaining--you will find words of that type in the original, seminal Radio Shack award--it is now very difficult, it appears, to lead evidence that proves motive. If someone is skilful, it is very difficult to prove that he is unlawfully motivated.

When I started practising in this field close to 10 years ago now, there were perhaps more egregious unfair labour practices--not to say they still do not occur in smaller locations--than one may see in 1985-86. Now the more difficult person we are dealing with is a very sophisticated union buster who does not make silly errors and who can talk you to death or keep you there for a long period of time. That change has made it very difficult, and it is why the response from the labour movement with respect to access and the concern about the language of subsection 40a(2) have been so strong.

I know the minister has made it clear that the intention of the government is that this not set up a bad-faith bargaining standard. If this thing goes through in its present state, one would not want to be in a position where one could not at least make the argument, based on the minister's statement, that it does not in fact do so.

Having said that, I believe it is self-evidently clear that, if the government intends to introduce a bill that does not set up a bad-faith bargaining standard, it is very simple to remove the contrary argument. I have seen and discussed clause 40a(2)(b) with a variety of people regarding whether it is something different from bad-faith bargaining. I think there are powerful arguments to be made that in effect it represents, in conjunction with the other sections, a bad-faith bargaining standard.

If there is any intelligent argument that can be made to this effect--and I think there is--why is it necessary to leave that possibility open? Why is it necessary for us then to have to appear before the board in the months to come and try to argue which standard is applicable and then be

in a legal argument about whether the statements of the minister at a meeting, at a committee or otherwise are admissible or dispositive with respect to the board's interpretation of the statutory language?

Mr. Collins has used the word "frustrated" a few times during his remarks. I hasten to tell him that "frustration" is not a word I would ever have used during the course of submissions before the board, and it is one that is not known in a labour law context.

The concern I have about the phrase, on behalf of the union, is that where it speaks of collective bargaining having been frustrated it seems to me that we may be in a situation where the process is confused with the result. It might be argued that if collective bargaining has not been frustrated, where there has been a pattern of very difficult, prolonged meetings but hard bargaining has taken place, surely the standard that I assume is intended by the bill is where a collective agreement has not been reached for a variety of reasons that are set out in clauses 40a(2)(a) to (c). It would seem to me, and I make this submission respectfully, that the much more sensible way is to give the board the jurisdiction to impose a collective agreement where there is no likely prospect of a collective agreement being reached in the near future. If that standard is used, the intention of this bill is more likely to be realized.

I do not like the word. It is really a conflict of confusion. Arguably, a process would result where collective bargaining has been frustrated. The term "frustrated" is one which is unknown to me in a labour law context. Clearly, subsection 40a(2)(a) and clause 40a(2)(c) are bad-faith bargaining standards. Clause (c), if it is not on a bad-faith bargaining standard, is virtually identical and if that is not what is intended, then it should, in my respectful submission, go.

The time limits are workable with the bill as drafted. We do not need pressure at the labour board as to what "uncompromising" means, "without reasonable justification" means or what kind of standards are to be applied there. If that is going to be litigated over a prolonged period of time there is going to be tremendous pressure on these time limits and there may be unnecessary pressure on the ministers to extend the time limits. What are they going to do if the board says, "There are three more days of evidence, and we cannot meet your time limit." What is the minister going to be doing in those circumstances? What choice is he going to have? What position will the Divisional Court be in if an employer alleges that there has been no natural justice because the time limits have not been met?

Mr. Callahan: The minister can deal with that.

Mr. Hayes: Yes he can. I am simply saying that if we reduce the possibility of dispute on the access level then there will not be that type of pressure.

Mr. Callahan: I was not addressing what you are saying. I am saying it is there.

Mr. Hayes: We do not need to build up the pressure which will create the necessity to gain extensions that could put him in a difficult position.

With respect to subsection 40a(15), which clearly is the other important section of the bill, the more sensible approach to be taken in this area is to allow the board of arbitration, or the board, as the case may be, the

opportunity to consider matters which are relevant in their judgement. Lawyers are very good at putting before a board of arbitration, or any board, what factors are relevant. The difficulty with subsection 40a(15) and particularly clause (b) as it is drafted, is that there is an argument that by putting in terms and conditions negotiated through collective bargaining for employees performing the same or similar functions, in the same or similar circumstances, one could be led in a bit of a circle if, for example, some other department store two years from now comes before a board of arbitration and is confronted with a collective agreement which was reached in the Eaton's case.

Is it open to argue? I think it is open to argue under subsection 40a(15)(b). That is a powerful consideration, it having been reached in the free collective bargaining, for the board to consider. Granted, the board, under subsection 40a(15)(c), has the jurisdiction to consider these kinds of factors. Although I appreciate that subsection 40a(15)(b) also comes from other statutes in Canada, there is no real necessity for it if the basket clause under clause (c) is contained.

I commend the bill for the two-year provision. That will be helpful. To someone who has done more of these first contract disputes than anybody in terms of litigation in recent years, the concept of the bill represents a major change and an important addition.

12:40 p.m.

I wish to conclude simply by saying I do not think this bill by itself is a panacea to wonderful labour relations everywhere in the province. I know this client and other trade unions are not of the view this will answer all of the concerns under labour law but it is an important step. Some people say it has not worked in British Columbia because they do not use it very often. I would submit that is probably a sign of success rather than a sign of failure.

It would be my prediction, if this bill goes forward and I hope in an amended form, that it may be used a great deal initially while there are some of the concerns that are out there, that it will die a natural death. I ask you to be very chary of concerns which I am told have been brought to you, arguments of future floodgates, that everybody is going to come to you and the bargaining will be over in the first-contract area. Think of all the arguments you heard back in 1980, dealing with the amendment of the dues checkoff at that time and the right to refuse unsafe work. The same arguments are made to you every time there is a progressive piece of legislation brought before you.

Do not just listen to me; look at the British Columbia experience, where the legislation has not been used that often. The parties do not want to go to arbitration if it can be avoided. The trade union movement, as many of you may know, was opposed to any form of first-contract arbitration for a long time because they were afraid it was the thin edge of the wedge; that it would lead to a considerable amount of compulsory arbitration in other areas. Experience has taught us all that a small intrusion of this type at a first-contract level does not answer problems on a second and third contract if there is still an intransigent employer, but that is perhaps something that has to be dealt with by the parties.

In a first-contract situation, this is a limited intrusion. I am quite sure if Eaton's had been faced with this bill, it would not have taken a chance on any fair-minded arbitrator with respect to the type of seniority language it subsequently has obtained. I remind you that, in the Eaton's

dispute and others, in the vast majority of cases, the first-contract disputes are not about money. In most cases, they are about dignity.

I cannot think of any of the cases I have just mentioned in which we have been involved that were over money as a primary issue, or as an issue of any importance at all. They are about basic first-agreement, decent contract language of the type many major corporate constituents have been living with for donkeys' years. That is all it is about. In those circumstances, the board is quite capable of producing the basic agreement that will address those types of concerns without putting Mrs. Carson and people like her through the misery they have been put through.

Mr. Collins and I fully intended to come before you, not to tell you anything you have not heard before, but basically to second the type of motions that have been put. The bill clearly could stand a very straightforward and simple amendment which would accomplish its purpose, in my respectful submission. I thank you very much for your attention.

Mr. Chairman: Thank you, Mr. Hayes. A number of members have indicated interest in asking you questions. Before that, Mr. Collins, you indicated there were 14 applications and only six stores. Why were there more applications than stores? I do not understand that.

Mr. Collins: In some stores, we have a part-time sales certificate, a full-time sales certificate, a part-time office certificate and a full-time office certificate.

Mr. Chairman: Do you have to have different contracts for each?

Mr. Collins: We have separate collective agreements. The company refused to negotiate one collective agreement for those stores. We have four collective agreements in one store and two in each of the others.

Mr. Callahan: I saw these people on the picket line in Brampton and I can tell you it did not make me very proud to see a store that was securing a good deal of business from the people in my community treating its employees in that fashion. Having said that, can you tell me what the numbers for certification were in the Brampton store? What was the percentage?

Mr. Collins: It was 85 per cent there.

Mr. Callahan: That discounts some of the statements that have been made here, that if you get a large percentage rather than a lower one, it should give you a better crack at getting a first contract.

Mr. Hayes: Frankly, often that would be the case if there was stronger support. If there is a one-plant situation where you had a vast majority supporting it from the outset, there would be no question. That is obviously the system when you are talking about a major corporation. Of course, we do not have any access to Eaton's profit statements, but presumably they could shut the Brampton store if they wanted and survive.

Mr. Callahan: I doubt that they would.

Mr. Hayes: I am quite sure they will not.

Mr. Callahan: That is a very successful store.

Mr. Hayes: I am using that as an example.

Mr. Callahan: I am going to ask a question. I have practised for 20 years in a different field and as a lawyer I always have considered that you advised your client as best you could but within the framework of what was ethical and proper. From some of the suggestions that were made by Mr. Collins, I gathered that within the framework of labour relations work, if you are an employer's solicitor, there are no bounds. At least, he seemed to imply that you can advise your client to carry on activities that really are illegal or borderline illegal. Is that a fair statement?

Mr. Hayes: No, I do not accept that proposition. I am not trying to defend the lawyers' club but I do not think there is any question that a lawyer has an ethical obligation to put up a legitimate defence for his client. On the other hand, in the labour law area many of the submissions that one makes are policy-directed. The Ontario Labour Relations Board can go in a number of directions, depending on what labour policy is. Language can be interpreted in various ways. The employer lawyers, some of whom I respect, take quite a different view of where the lawyer should or should not go.

Mr. Callahan: Just to take the last example, where you get a collective agreement, for Eaton's to have upped the salaries of the nonunion members, they must have done that on the advice of someone. I do not know. Is that fair ball or ethically sound within the basis of a solicitor advising a client?

Mr. Hayes: I have no knowledge as to what counsel, if any, Eaton's sought from their solicitors. I would really be very loath to speculate about what type of advice Eaton's lawyers did or did not give. All I can say, as a lawyer representing a trade union, is that if one of their adversaries or a corporation takes certain conduct that we think is illegal, the only thing we can do is take it to the appropriate tribunal and see whether we are right.

Mr. Chairman: Is this an appropriate line of questioning?

Mr. Callahan: It is in the sense that I am trying to determine whether or not the difficulty lies with the lack of legislation or within how the game is played, who the players are and how they advise the game to be played. I just want to ask one more question along those lines, then I have others which perhaps are more relevant. We have heard evidence here during these hearings that there are people who write books on how to keep the union out, so I gather there is some format of steps you can take to attempt to dissuade unions from being able to organize or certify in a particular business.

Mr. Hayes: I am told there are groups in the United States who make a fair fortune out of it.

Mr. Callahan: Nothing here?

Mr. Hayes: I do not know about that.

Mr. Mackenzie: There are seminars at a very high cost.

Mr. Callahan: That was another thing that was raised.

Mr. Hayes: In terms of this nonunion environment, I suppose there would be persons on the other side of the fence who look at the world

differently than my clients and I do. They would say that as long as they do not break the law and can encourage their people to remain union-free, there is nothing the matter with that. There are some people who have that view.

Mr. Callahan: I will back off that element but I know that the rules of practice have been amended so that the lawyer can wind up paying the costs if he advises his client in an inappropriate fashion. Perhaps that should be considered for the labour relations legislation.

Mr. Hayes: One cannot cross-examine normally, though, if solicitor-client privileges are nil. That is always an impediment.

Mr. Callahan: I am not suggesting this but if it were the case that it was not proper, you could.

I will just go on to the next thing. We had a very interesting point raised here about the lack of definition of first contract in the legislation. The reason I raise it is because it would be very germane to the Brampton Eaton's situation. To put it in the framework of my poetic friend--who is leaving right now--they were trying to say the definition should be virgin territory with pregnant possibilities.

12:50 p.m.

In other words, if you had a first agreement, as you people do, you would no longer benefit from this legislation, even if we were to pass it before a union was decertified. What comments do you have as counsel? What you people could get into would be the question of whether it was legitimately a first contract or whether it was one that was entered into somewhat under duress in order to retain the jobs of the employees.

Mr. Hayes: To be very candid with you, it would be very difficult to sustain an argument that the agreement the trade union signed was not a collective agreement; I cannot see that argument flying. Although my client clearly has not accepted the reasoning of the board, the board found that on the legislation as it existed, the company had not acted illegally, leaving aside any question of morality, which they did leave aside. Ultimately a collective agreement with basic terms was concluded. It would be very difficult for me to give anybody advice that we go before the board to suggest that although it was signed, under the statutory requirements it really was not a first agreement.

Mr. Callahan: My final item, and I have put this to a number of the witnesses, is the question of access and the terms that are proposed by the government in the bill, recognizing the fact, as I think you have in your submissions, that the government has attempted to create preconditions that are less than bad faith. We maintain that they are less than bad faith. We have heard other people say they are not.

Under section 19 of the Courts of Justice Act, the Lieutenant Governor can refer a particular clause in legislation to the courts for a decision by the Court of Appeal. Up to this point everyone has thought that by doing that, for some reason, because of the myriad of fact situations that you get at the board, that would not be of any value.

I am not suggesting that is the government's position. I am putting that forward to get some idea from you. If that were done and the Court of Appeal were to define that as being something less than bad faith, as defined by the

jurisprudence and the labour relations proceedings in the past, would that change your view as to the value of the preconditions as they now stand?

Mr. Hayes: The difficulty I have with the question is this: The government has indicated--at least the minister apparently has indicated publicly, and I believe here as well--that there is no intention to insert a bad-faith bargaining standard into subsection 40a(2). If that is the government's position, it seems very easy to accomplish that by amending the bill now without referring something to the Court of Appeal.

With all due respect to the Court of Appeal, normally we have expert tribunals. As a lawyer you would be well aware that these administrative tribunals are expert in a particular phase of the law. Without in any way being presumptuous, it would be difficult to contemplate a reference which would expose the variety of fact situations which would produce a useful answer.

All it would do is delay the bill, leave the things in the courts for I do not know how long, perhaps a year, and in the end leave us with something which could have been cleared up by the Legislature. With great respect, it seems to be almost an abdication of responsibility of the members, if that is the intention of the government. I do not mean that disrespectfully.

Mr. Callahan: Finally, on that point, if we all know the cat needs to be belled, how do we bell the cat so that everybody is satisfied the cat has been belled and avoid this long and lengthy litigation to which you refer? In determining those facts, you are going to be in the same position if amendments such as those are made.

I am sure the ones you were addressing were the ones that were suggested by Mr. Shell of the United Steelworkers of America. You may be in exactly the same position. You may go through endless litigation in determining whether that is less than a bad-faith test. The fastest and swiftest way would be to get a determination of a higher court which could be used as a precedent or guideline for the Ontario Labour Relations Board.

Mr. Hayes: Again, with respect, the simplest way to cut through it would be to say, "Where a collective agreement has not been reached, the matter is then referred." That cuts through it all.

As I understand the submissions that have been put to you, they have been trying to offer something slightly different in view of the political reality that the government appears not to have been persuaded to agree to immediate access. Obviously, I am only speaking now of this union at this time. It is only within that framework that a lesser standard is being suggested to you.

It appears to me that the only lesser standard that makes any sense is one where the board is asked the question, "Is a collective agreement likely to be reached within a period of time?" I do not know whether you would want to add anything such as "in the public interest" or some other phrase. I am not suggesting that, by the way, but you could put in whatever you wanted. If a collective agreement has not been reached within a reasonable time, the scope of the inquiry should not be whether Stelco, Simpsons, Sears, Radio Shack, the man-in-the-moon store or the corner store should have various kinds of provisions, or why the steel industry or the department store industry should be looked at, or what is uncompromising and what is not.

Is it unreasonable not to meet during the summer when a member of someone's family is going away and you cannot meet? I will not use a personal anecdote from the Eaton's dispute. What is reasonable? What is not reasonable? If the scope of the inquiry is reduced, the length of litigation is usually reduced; but I agree with you. Once there is any test for access, there is going to be some opportunity for people to make submissions and lead evidence.

I am not trying to be utterly unreasonable. The board would have some responsibility to conduct its hearing with dispatch, sit long hours and make various determinations and say what is relevant and what is not. But at the end of the day, where does it all lead? If I could reiterate, you have heard such a symphony of concern about access because, with all due respect to the labour board, it seems in the past two years there has been a very tough position taken in this area. One would not necessarily have predicted this position, looking at the jurisprudence as it began in 1979 with the Radio Shack awards. The trade union movement and my client are very concerned about that.

When I look at this bill, I try to be hypothetical and say, "What would our position have been before the board in the Eaton's dispute?" I can honestly say I would have grave concern about our ability to get access under the legislation as it is written at present. Until the board makes some decisions, who knows? I cannot tell you--no one can--with absolute certainty what the board would find. I have to be fair; I try to be in these matters. Lawyers may come before you and say they honestly feel this is not a test. I believe those people when they take that position, that they have that view honestly. The question that still has to be answered, surely, is this. If the government does not mean to set a hard, bad-faith bargaining standard, all one has to do is to make that--I believe that is what the minister intends. Personally, I do not doubt him, not at all, but why do we then have to get into an argument about what the standard should be of these various kinds of debates we are having?

Are they admissible? If they are admissible, how much weight do they have? There are other considerations with which you would also be familiar. All the boards and the courts are taking that kind of thing into consideration these days. Ultimately, they are looking at the legislation and have to interpret it. For all I know, I will myself be saying in the first of these cases: "You said it was bad faith. Did you mean it or not?" If that is what it means, it was unamended and we shall be hoisted on our own petard. Do not think that has escaped my attention. If the government does not mean it, I say respectfully that it should be changed.

I have yet to hear a convincing reason. With respect, without a political reason being attached to it and in a broad sense, not in a partisan way, why is there any necessity for these hoops that have to be hopped through? It is only a one-time shot. It is a Band-Aid situation. It is a first agreement; the agreement lasts two years. It is hard for me to believe, looking at the history of compulsory arbitration in Ontario, that people are seriously concerned that arbitrators are going to grant outrageous increases to put people out of business. I just do not believe it.

Mr. Callahan: This obviously puts some pressure on both sides to try to negotiate in the best possible way through a collective agreement.

Mr. Hayes: I agree with you.

Mr. Callahan: That is as opposed to having a free flow to

arbitration and lying back and letting it go to that. Those are my questions.

1 p.m.

Mr. Pierce: Mr. Collins, if this legislation as it is drafted had been in place, would you have suggested that the draft contain an area that would allow you to apply for arbitration subject to or before a strike or lockout by Eaton's, for example, in the case of the Eaton's dispute?

Mr. Collins: That it would be necessary prior to a strike?

Mr. Pierce: Yes. Or would you have preferred to take strike action first and then, when strike action was not the answer, apply for first-contract arbitration?

Mr. Collins: In the particular situation, we would have wanted it before the strike.

Mr. Pierce: Let me go one beyond that, beyond the Eaton's strike. In the next application, how would you feel?

Mr. Collins: If we have another application in Eaton's--

Mr. Pierce: No, not Eaton's but Joe Blow's garment store.

Mr. Collins: It would depend on the nature of the matters in dispute at the time you have to make those decisions. If it is a wage question or some peripheral matter where you are sitting with half a dozen issues, a strike may very well be the proper way to resolve it. However, with the multitude of things that we had outstanding and the nature of them in the Eaton's situation--there was a debate on whether we were even legal--we would have had to refer the matter to the board in any event, to deal with some of the clauses that were on the table. We had no choice.

Mr. Pierce: Therefore, you would not like the legislation to preclude the right to strike or the right to lock out.

Mr. Collins: No. We would not.

Mr. Pierce: That is really the question I am asking. I realize that in the Eaton's situation, the first-contract legislation would have been preferred over the strike, given the factors you talked about and the large number of outstanding issues. However, in the next one when you may have only one or two issues, strike action, a short strike, may be an opportunity to come to some conclusion. If it extended over a long period, you would then like to be able to go to first-contract arbitration.

Mr. Collins: That is correct.

Mr. Chairman: There are no other questions.

Mr. Hayes, Mr. Collins, Mr. Kessig, Mr. Carson, thank you for appearing before the committee. I do not think there has been a presentation to the committee that has not mentioned the Eaton's strike, on both sides, whether they were for or against the bill. It is very good to have people who were in the trenches in that dispute here before the committee. We appreciate your coming before us.

Mr. Collins: We hope it is the first and last time in terms of that.

The committee recessed at 1:06 p.m.

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STANDING COMMITTEE ON RESOURCES DEVELOPMENT
LABOUR RELATIONS AMENDMENT ACT
THURSDAY, APRIL 3, 1986
Afternoon Sitting



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Wrye, Hon. W. M., Minister of Labour (Windsor-Sandwich L)

From the Harvard Law School:

weiler, P. C., Professor of Labour Law

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON RESOURCES DEVELOPMENT

Thursday, April 3, 1986

The committee resumed at 2:16 p.m. in room 228.

LABOUR RELATIONS AMENDMENT ACT
(continued)

Consideration of Bill 65, An Act to amend the Labour Relations Act.

Mr. Chairman: The committee will come to order. We are privileged to have with us this afternoon Mike Failes, policy analyst for the Ministry of Labour. We welcome the minister and deputy minister to the committee.

This afternoon we have Paul Weiler with us, who has been mentioned in dispatches on both sides of this issue. We welcome you this afternoon and look forward to hearing some of your comments on first-contract legislation.

The committee is at least aware of the role you played in the British Columbia legislation, and we are anxious to hear your views on the whole concept of first-contract legislation. I do not think I am presuming anything in saying that we would like to hear, in particular, about your views on access to the legislation when a dispute occurs.

Mr. Weiler: Thank you very much, Mr. Chairman. It is a pleasure to be here. For the reasons you have mentioned, I had some sense of discomfiture in coming. I know that people from one side or the other on these issues are probably going to be able to quote back to me things I said then that may be inconsistent with what I am saying now, but I hope not too inconsistent.

Mr. Taylor: Now you know how the Conservatives feel.

Mr. Weiler: What was it that Samuel Johnson once said about consistency being the hobgoblin of small minds?

This is a subject in which I have had a deep and abiding interest for more than a decade. I can recall helping to draft the first very rudimentary attempt to write into labour legislation some such measure as this. What we had to say about it covered 10 to 15 lines in the statute book. We have more than a decade of experience with that kind of measure, not only in British Columbia but also in many other jurisdictions.

There are a lot of issues. I can say at the outset that whatever one's views about certain key parts of it, this is a very sophisticated and well-worked-out version of this measure and how one should go about doing it. I know there will be a number of questions about some of its specifics, and I will try to be as candid with you as I can.

At the outset I might say just a few things about the fundamentals, because however detailed, elaborate and sophisticated the drafting of the legislation is, in the final analysis there is a fundamental core problem. What is the measure for? Why do we want to have arbitration of collective agreements? That at least gives us the guidance we need about, first, when we should do it, and second, how we should do it.

It seems to me it is for the situation in which the process of collective bargaining has failed. It has not simply happened that there has been an inability of the parties to come together and reach an agreement at a particular time. There is a broader problem. The process has failed.

One of the implications of recognizing that is the problem we are trying to deal with here. One has to go beyond proved violations of the duty to bargain in good faith as the reason to have first-contract arbitration. Clearly, if one wants to have that, that tends to be the starting point. Situations in which the process has failed because of bad-faith bargaining on one side or the other are the most obvious examples of when we should do it. That is reflected in the draft of Bill 65 that you have before you, but one has to go beyond that.

The single most important place to go beyond it is probably in taking some significant account of the substantive positions a party may be taking in collective bargaining. However deferential the system as a whole is to the process of free collective bargaining, particularly in the very early stage of the relationship succeeding the certification, it has always seemed to me that reaching the collective agreement is the single most important phase in establishing for the first time an ongoing collective bargaining relationship. The law's very serious commitment to free collective bargaining cannot be allowed to become an absolute rule.

One has to have some account of very hard, very unreasonable bargaining positions that have frustrated the ability of the entire process to get to that stage. As I read the bill, it seems crystal-clear on the face of it that the statute contemplates that is a reason for having first-contract arbitration. It does so in this province, in other provinces in Canada and in the United States. In situations where it is clear you could not get from a labour board a finding of bargaining in bad faith, you will now be able to get a decision from a board that there should be arbitration of the first contract.

While that is the most important step to take beyond the conventional confines of the duty to bargain in good faith, one would immediately assume that any board would say there are a variety of other situations which are encompassed by the final subsection of 40a(2), other reasons that the board might consider relevant.

Concern has been expressed in some quarters that a very unsympathetic board might read that as simply ejusdem generis--that is the fancy phrase lawyers tend to use--with clauses (a), (b) and (c). I do not think that is how a board should read it or would read it, but as I said, even if a board were so inclined, clause (b) clearly goes beyond the duty to bargain in good faith in any event.

However, any sensible board reading this statute would realize that "any other reason the board considers relevant" is not an entirely open-ended invitation to find any reason that happens to come to the mind or attention of the panel or board, but rather, as the phrase is used here, reasons that suggest collective bargaining has been frustrated or, in other words, that the process of collective bargaining has failed.

I can think of several. Two illustrations immediately come to my mind out of experiences I have had in British Columbia, and I know about in Ontario and in other places. One of them is a situation where one party--typically in these cases it would be the employer--has committed serious unfair labour practices early on in the representation stage.

The unfair labour practices might amount to discriminatory dismissals of union supporters, which may have been initially remedied through reinstatement, but which have an ongoing chilling effect on the ability of the employees to stand up to the employer in this situation and make it impossible for the union to do anything serious at the bargaining table. In the appropriate circumstances, that would be a relevant reason for the decision about first-contract arbitration; a reason that goes beyond and is outside the scope of the duty to bargain in good faith. We will probably spend a bit of time on that later on in questions.

Another situation might be a case where, for a variety of reasons, the dispute has become a public cause célèbre. There might be violence on the picket line. The issues might be such as to capture the attention of the media and maybe even a few politicians. So much attention is being turned on that issue and so much seems to be riding on it that the parties are simply not able to come to grips with the real tangible issues that divide them at the bargaining table.

It might not be because of any improper conduct and certainly not because of bargaining in bad faith by one side or the other. It is simply a large problem that has been created, not only for the employer and the union, but also for the workers involved and even the community as a whole, which is being asked to take sides in this type of dispute.

Those are illustrations of the situations for which an expansive first-contract-arbitration remedy should be made available. They all fit within this general phrase, this theme I have suggested; the idea that the process of collective bargaining has failed or has been frustrated in some way or other.

Having said that, let me turn to the other side of that same access issue. Why should there be any limits on the access? Should it be sufficient that a collective agreement has not been arrived at, either immediately or within some time frame, however that is defined? I understand there is attraction in that idea; there is appeal in that idea. Indeed, that is something we seriously considered initially more than a decade ago in BC.

It eliminates the need to make the kinds of judgements that are contemplated by the four clauses in 40a(2). There is a simple reason--one we will elaborate on later--why one should not go that far. It comes back to what I just said; the point of this measure of first-contract arbitration is to do something about the situation where the process of collective bargaining has failed.

If you make first-contract arbitration an automatic right, which one side or the other or both sides realize is sitting at the end of the process to try to negotiate the first collective agreement, as we will talk about later, there is evidence in a very considerable number of cases that first-contract arbitration is the reason that the process of collective bargaining has failed.

It is an idea that, on initial reaction, people do not fully appreciate, especially mediators who have been involved in disputes in the hospital industry here, for example. Once a party or the other or both know that the end of the process is a guaranteed right to first-contract arbitration, that is going to create the need for first-contract arbitration and the process of collective bargaining is simply not going to be able to operate nearly as effectively as it can.

Instead, the experience in reflecting on this problem of resolving disputes in collective bargaining and, indeed, resolving disputes in any area of human conflict, not only in this province and this country but also in places around the world, is that the ideal way of achieving voluntary settlements by the parties is to have both parties somewhat unsure about the consequences of failing to agree and realizing that there is no automatic route to success in whole or in part and that there is a risk in failing to agree. That is the kind of motive and incentive you have to have in order to achieve agreement.

It seems that the basic structure of Bill 65 is ideally suited to first maximizing the incentive that we can have to achieve the prenegotiation or the voluntary negotiation by the parties of first collective agreements. Yet there remains the ultimate measure, which in appropriate situations can be used to deal with situations where the process has not been able to function and something simply has to be done in order to serve the larger objectives of the statute. With that I will conclude the opening comments I have and invite whatever questions you might have for me.

Mr. Callahan: I am sorry my colleague Mr. Mackenzie is not here, because that was one of the issues that (inaudible) by open access you would be encouraging more first contracts, as you say, to be settled by arbitration as opposed to the people putting their heads together and coming up with the alternative.

2:30 p.m.

I was going to refer to some of the comments that were made here by some of the witnesses about the use of the word "frustrated" making the test more difficult. I think it was Mr. Pilkey who suggested that in his dealings in the labour movement he had never come across that word. He never knew that as a labour word.

Mr. Mackenzie: Mr. Hayes, not Mr. Cooke.

Mr. Callahan: Mr. Hayes. Do you see that word as doing that?

Mr. Weiler: The word "frustrated" is something we might not come across in collective bargaining. I have had a lot of involvement in labour-management disputes, collective bargaining and other kinds of labour relations disputes. I sure have been frustrated a lot of times, and I have heard a lot of people use the word "frustration" a lot of times. It is a commonsense word.

Mr. Taylor: It is the story of my life.

Mr. Weiler: People have a pretty good idea of what it means most of the time.

Whether that term is the absolutely ideal way to express the theme that can and does animate this provision, the important thing is to understand this distinction: it should not be and cannot be sufficient reason for doing something very unusual in industrial relations. That is what arbitration of a contract is. Doing something quite unusual means simply that parties have not been able to reach an agreement. A particular agreement between two parties at one time has not been reached.

Rather, one's concern is that the process of collective bargaining has

failed. It has failed because of one of the factors that is named and then one of the factors that would be seen within the framework of clause (d). There is no magic in the term "frustration," but there is certainly no great mystery in it to anybody who has been in collective bargaining or who has been anywhere else.

Mr. Callahan: It was suggested by one of the witnesses--I think it was a school board--that the word could be "unsuccessful." Collective bargaining has been "unsuccessful." Would you see that as opening it up any more?

Mr. Weiler: That would open it up. Changing "frustrated" to "unsuccessful" so that the phrase reads, "Collective bargaining has been unsuccessful," might too often convey the meaning that collective bargaining has simply not produced a collective agreement. One wants more than that. If there were a strong appetite for changing the word "frustrated" to "unsuccessful," I would suggest also changing "collective bargaining," making the phrase, "the process of collective bargaining has been unsuccessful." You then make it clear that we are talking about something that is unusual, not something that is simply a run-of-the-mill failure to reach agreement.

Mr. Callahan: It is just a half-hearted try, and then a run to the adjudicator.

I know from talking to you earlier that you have not been around here for a while, but you probably followed the Eaton's strike out in Brampton. The point was made by the last delegation prior to lunch, and by several other delegations as well, that even if this legislation had been in place, they would not have met the test to get to arbitration. Are you familiar with what surrounds this?

Mr. Weiler: I have read the decision in the Eaton's case. I occasionally get up to Ontario and Canada, so I am not totally removed from the situation. I do see the newspapers and am familiar with the case. I want to say something about my view in response to that specific question, but I want to add this initial caveat, because from my own situation it is important. I find that what you get from being a rather casual outside observer of disputes, especially if you are observing them through newspaper stories, is not necessarily a full and accurate version of what has transpired.

I do not want to be seen as stating a positive position about what actually happened there, but from what I understand happened in the Eaton's dispute, as reported by the Ontario Labour Relations Board and the findings that were made, that case clearly fits within clause (b) as a potential candidate for first-contract arbitration.

In reading clause 40a(2)(b) and that decision--a decision of the majority which found, consistent with the jurisprudence, not only in Ontario but also in other labour boards in North America, that there was not bad-faith bargaining in that situation. If it is true, as I infer it is--given what the board found there it would find that clause 40a(2)(b) is satisfied; clearly, first-contract arbitration here is going beyond the traditional scope of bad-faith bargaining.

Mr. Callahan: Just one further question, if I may. The witnesses who have come before this committee, depending on what area they come from--chambers of commerce would say the wording is open access and many, if

not all, of the unions testified that in their opinion and on advice they had had, that clauses (a) and (c) were nothing more than bad faith. I am sorry, I think they found that all of them were bad faith. There was a third position, I cannot remember who put it forth, that clauses (a) and (c) were bad faith but (b) was something less than bad faith. I ask you to comment on that.

Mr. Weiler: I am a subscriber to the third option there. Clauses (a) and (c) are tracking the language of the duty to bargain in good faith. Clause (b) goes beyond both the legislation and the jurisprudence in the most important area, the one that we are all concerned about. Thus, it is important to write that in on the face of subsection 40a(2).

Whatever else one might say about clause (d), it clearly goes beyond the duty to bargain in good faith. If it did not, given that you already have clauses (a) and (c), which are the duty to bargain in good faith, there would be no need for (d). However, clause (d) is there, and any tribunal with even a minimally sympathetic attitude to the legislation, and recognizing its legal obligation to give effect to the words that the Legislature has formally adopted and not to treat them as a mere waste of time and space in the statute books, will have to interpret (d) as going significantly beyond the jurisprudence of the duty to bargain in good faith.

Mr. Ramsay: It is an honour to have you here, Professor Weiler, and I am glad to tell you I have enjoyed your opening remarks.

I want to try to get further detail from you on why you feel automatic access would be inappropriate to this amendment. Let me just confirm with you that I understand your argument. If you will allow me to paraphrase, I believe you said that automatic access would actually destroy the collective bargaining process because it would minimize the risks to one or both parties. Is that fair?

Mr. Weiler: Part of it. I will elaborate on what I mean in a moment .

Mr. Ramsay: All right. When we have had many of the union groups before us, they have consistently said they do not desire arbitrated settlements. As a matter of fact, it has been only in the past six or seven years that unions have come to grips with this and said: "Maybe we are going to have to go this route on the first contract. We do not like it, but maybe this is something we are going to have to settle for to dissipate the bitter, sometimes protracted strikes we get on first contract and the feeling we get."

I present that to you and ask you if you could elaborate a little more on that.

2:40 p.m.

Mr. Weiler: It is important to understand the underlying dynamic of collective bargaining and how it is affected by the prospect of arbitration and to understand it generally before we think specifically about the first-contract arbitration issue.

I had a chance earlier today to look at some of the briefs that people had filed. One of them was by the Canadian Union of Public Employees, subscribing essentially to the view that they genuinely want to negotiate to write their own agreements. Employers are recognizing their unions and are committed to the process of collective bargaining, although they are not necessarily prepared to make particular concessions.

They have exactly the same attitude. They would much rather have the power to write their own agreements than have some lawyer or law professor parachuted in to write the contract for them. They are likely to get a much better agreement if they write their own than if an outsider does the job for them.

Think about the experience of CUPE itself. CUPE wants to write its own agreements. In the hospital industry, CUPE writes less than half of its own collective agreements every year. It rarely writes an important collective agreement in the hospital sector. The hospitals also do not write their own agreements. It is arbitrators who write those agreements. Why do arbitrators write those agreements? Why are the parties, in genuine good faith, not anti-union employers, frustrating the entire system? Why is there such a tremendous lack of success in the process of free collective bargaining? It is because at the end of the line, there is automatic compulsory arbitration for one side or the other, if they do not reach an agreement.

How does that have an effect on the process? There are a variety of ways. Very simply, any party knows that if any offer it makes at the negotiating table is not successful in achieving that voluntary agreement by getting a comparable concession from the other side, that offer is not only not positively productive, it is counterproductive. That offer is going to be held against that party in arbitration. You are an employer and you would like to reach a settlement at the five per cent range, for example, and the union is asking for 10 per cent; if you offer five per cent and the union does not take it, when you go to arbitration, it is very likely the arbitrator is going to decide it is something in the order of six, seven or eight per cent--somewhere in between the position of both sides.

Similarly, take the case where you are the union and you come down from the 10 per cent to a seven or eight per cent position, which is perhaps where you would really like to end up. The employer sticks at five per cent and no settlement is produced but the ceiling has been lowered just as in the other situation the floor has been raised because of people at the negotiating table.

The mediator has to attempt to work with those parties and appreciate the technical language that is used by industrial relations scholars, because of the chilling effect that the prospect of arbitration has on the process of making concessions at the bargaining table.

Remember, I said that well over 50 per cent of the collective agreements in the hospital industry in Ontario require arbitration. In a sense that is a low estimate because any significant collective agreement in the hospital industry has to be arbitrated. The ones that get signed voluntarily are the satellite settlements that simply follow that pattern. That is in an industry where you have long-established, sophisticated and mature relationships, where both sides know they have to live with each other and where you would have the ideal preconditions for arriving at a settlement at the bargaining table.

Think about the first-contract situation. First, you have nothing with which to start. You are trying to write a contract from scratch. In the hospital industry, you have the collective agreements. The basic structure, language and principles already have been worked out. You are dealing within that framework about specific problems as they have arisen in the relationship.

Writing the first contract is a much more difficult exercise than

writing the renewal of an existing contract the third, fourth or fifth time down the line. In the kinds of situations you are particularly concerned about, and this tends to be symptomatic of first-contract cases, the relationship is less than happy. Too many employers not only find it difficult to write the agreement--anybody would find it difficult to write that first collective agreement--they do not even want to start down the path.

Given that, and to a considerable extent in reaction to that, unions are very suspicious of the performance of these employers. Unions may have been fighting employers at the certification stage, over unfair labour practices or by attacking petitions they feel are spawned by employers to generate a certification vote. The atmosphere and the relationship are poisoned. In the established collective bargaining relationship, the prospect of arbitration requires or produces the need for arbitration more than 50 per cent of the time.

Add the even greater difficulties in the first-contract situation and you are likely to have a lot more than the number of arbitrations one would otherwise expect. That poses some serious administrative problems. The system--the board or the arbitration community--is not that capable of simply absorbing an ever-increasing number of arbitration cases every year. Let us forget that, though, because one might say one can always expand the resources in the system to deal with it.

If you believe as I think you do, and certainly as the people who hold that view have voiced, that the better agreement is one written by the parties rather than by an outside arbitrator--somebody such as me--then you will want to design your first-contract arbitration measure in a way that will best get the parties to settle without going to first-contract arbitration. To do that, you will want uncertainty rather than an automatic right to get into the procedure.

Mr. Ramsay: Another argument the unions have consistently brought before us is that we could get into protracted hearings before the board in order to prove the case to gain access. They argue that very process is going to create more division and more bitterness between the parties, even before we get to arbitration.

If it went very quickly, if the process moved along and we got to arbitration, then the relationships would not have broken down any further from when the talks broke off.

Mr. Weiler: There is no question that if you require an initial judgement about whether first-contract arbitration is appropriate, rather than simply making it an automatic right, then to make that judgement in the cases where you have to make it is going to take some time and require evidence and proof and a decision by the board. In thinking about it, as I said in my opening remarks, if there were no costs to the alternative, one would want to write the section in a way that eliminated or minimized those costs.

2:50 p.m.

However, there are costs. One is that instead of having just a few first-contract arbitrations to engage in and use that time, all of--not all because the process clearly would not be destroyed; I think that is going too far--a lot of the ability of the parties to reach their own agreements would be seriously impaired. You will have to arbitrate a lot more cases. As

somebody who has done not only first-contract arbitration but also quite a bit of interest arbitration, the real time-consuming problem will be the arbitration process and not the access decision. It is worth spending some time making intelligent decisions about access and making the parties aware that you are going to make intelligent decisions about access so you minimize the number of cases that go to arbitration and maximize the number of cases for which the parties will write agreements themselves.

Mr. Gillies: If they were required to go through that hearing for the precondition to get to arbitration, do you envisage that out of that, the parties may come to their senses and allow for the kick-in of the provision for presettlement prior to--I am not sure whether that is effective prior to the decision of the board; I will have to take a look at that.

Mr. Weiler: Prior to the decision.

Mr. Gillies: Yes, it might make them realize. Do you think that might happen?

Mr. Weiler: In our experience in British Columbia, and I think this has been borne out by the experience in the federal sphere, once the applications have been made and the process is before the tribunal responsible for it, or the ministry as in Quebec, at that stage--you may occasionally get a case where the respondent is the union, though realistically the respondent will be the employer--the employers suddenly realize they are facing reality.

That tends to change the situation and produces a much greater appetite for settlement. We settled considerably more cases in British Columbia than we eventually had to impose through arbitration. In the cases where we settled a voluntary agreement, there was a very high chance that the collective agreement would be renewed and the relationship would survive the imposition of a contract.

Again, it is important to realize the point of the exercise is not simply to write the first contract and get rid of this immediate dispute. The point of the exercise is to give the employees a chance to have an enduring collective bargaining relationship. In my experience, rushing off to the arbitration table is not the ideal footing by which to achieve that.

Mr. Gillies: It is certainly good to have you back at Queen's Park, Professor Weiler. I want to ask you about the most contentious section of the bill in all the briefs we have had before us; that is, subsection 40a(2), the access section. The common thread running through the presentations seems to be that nobody is happy with that section, whether it is the labour groups who would rather have unfettered access or something that goes further than this, or the people on the other side of the issue who feel this goes too far.

My question to you is based on your experience in other jurisdictions. Is that a good place to start passing legislation which seems to be not well received by anyone involved? Are those problems settled in the first number of cases? Are the parameters laid out in the precedents and people become comfortable with it?

Mr. Weiler: Let me answer the first part of your question. Assuming there is a real problem and a tangible need for some response to it, and assuming that both sides accept, more or less grudgingly, that there is a problem and that one needs to do something about it, I think both of those conditions are satisfied about the problem of first contracts here.

I have always found that in labour-management relations and in a lot of other places where I have been involved in public policy, if the unions do not like exactly what I am doing and the employers do not like exactly what I am doing, I am pretty happy with the position I am in. That may be a pretty high compliment to subsection 40a(2) if that is the condition it is now in.

Mr. Ramsay: On clause 40a(2)(b), what is the difference between an uncompromising position and good old-fashioned tough bargaining?

Mr. Weiler: It is uncompromising without reasonable justification. First, it is the two of them together. I think you have to read one of them as helping to give meaning to the other phrases. Good old-fashioned tough bargaining means that you start out with some tough positions, some of which may not have any reasonable justification. You might have those in there to be able to trade them but you are going to make some movement. You are not going to sit stubbornly on a particular position, one that has no serious tangible value to you, and wait for the other side to commit suicide by going out on a totally unsuccessful work stoppage.

There is a famous phrase in American constitutional law that is analogous to this. It is the first amendment in a Supreme Court case dealing with obscenity law. Justice Stewart is quoted as saying about hard-core pornography, "I may not be able to define it, but I sure know it when I see it." Believe me; you might not be able to clearly and totally define the difference between good old-fashioned hard bargaining and what is contemplated by clause 40a(2)(b) but when you have seen these cases and been on a labour board, you know it when you see it.

Mr. Ramsay: But if it is a matter of principle for either side--

Mr. Gillies: We are concerned that some of the comments addressed to this section have been very strong. The Ontario Federation of Labour was here this morning, telling us they would rather have the status quo than have this bill as drafted. We have had other witnesses tell us that they do not--

Mr. Callahan: --hard bargaining or whatever that phrase is.

Interjections.

Mr. Weiler: That is an uncompromising position.

Mr. Gillies: We have had other comments arising out of your answer to Mr. Ramsay. We have had witnesses say, "Go ahead and pass this." They do not think it is going to do a darn thing except create a lot of business for lawyers. How do you answer these critics and say it is going to be extremely difficult and only in very rare instances will access be gained through this subsection?

3 p.m.

Mr. Weiler: In reading the key decisions--the ones that have preoccupied people during the last several years in this province--and reading that subsection as well as clause (d)--one should not leave that out--I think that is not true.

Second, if one looks at the experience in other jurisdictions which have had it--and this is not something that does not have any precedence in other places--people have been able to divide up the cases where first contract

arbitration is appropriate and where it is not appropriate. In the first decision we had in British Columbia, we actually wrote a decision that dealt with two cases to make it clear what kind of cases first-contract arbitration was designed for and those for which it was not designed.

The counsel that advised the parties were easily able to advise their clients in future cases about what was a likely consequence.

Again, there is an important lesson to understand from this experience. Do not overemphasize the significance of the occasional difficult case that gets to a labour board. Clearly, it is often a problem about which people can differ. The real success of a provision like this comes from the cases that do not get to the board or to an arbitrator. Those cases, in a sense, are a failure of the provision. The experience in other places is that you do not get anywhere near the number of tough cases, whether it is the Canada Trustco case, the Eaton's case, the Visa case or the whole list of cases that one can think about occurring in this province over the last several years.

Mr. Gillies: I have to admit that I cannot remember which witness told us their interpretation of the British Columbia experience was that negotiated settlements had been reached in first contracts without going to the arbitration process because of the existence of the arbitration process. It acted as an incentive to settle.

Mr. Weiler: It was because of two things. It was due to the presence of first-contract arbitration in the statute and because it was not an automatic right. The presence of first-contract arbitration in the statute gave the employer a real incentive to be reasonable at the bargaining table. The fact that it was not an automatic right gave the union the incentive to be sensible at the bargaining table, especially when dealing with the mediation officers of the board who were sitting with them in the back room, twisting their arms and getting agreements.

That comes back to what I said earlier. The essence of a good first-contract arbitration provision is one that is flexible. It is one where nobody knows exactly how it is going to turn out. It is that uncertainty about how it will turn out that gives the parties the incentive to make the tough compromises and concessions that are needed to get an agreement from the other side.

Mr. Callahan: On the other side of that coin, I suppose those employers who did not want to recognize the union probably felt very comfortable resisting the bad-faith test that has existed to this point because it would be very difficult for the employee or the union to prove the bad faith.

Mr. Weiler: There are two problems. That is why I simply cannot find credible the suggestion that the status quo would be better than having Bill 65. Bill 65 would be substantially better than the status quo if you just had clauses (a) and (c). The problem with the status quo is that there is no effective remedy even for proven bad faith bargaining. It is nonsense to suggest there is nothing that comes either from clauses (a) or (c).

Add clauses (b) and (d) and it may not be the Utopia that, mistakenly I think, the union movement here might want to have, but it is very clearly a substantial improvement over the situation that is produced. Indeed, if John had asked some of the Eaton's workers who walked the picket lines for those many months whether they agreed with the Ontario Federation of Labour that the

law that governed their situation is better than Bill 65, I suspect you might get a somewhat different answer from them.

Mr. Gillies: I have a couple of very specific questions regarding clauses 2(b) and (c). The language of the bill refers to the board having to consider the bargaining position adopted by the respondent. In clause (c) it says, "The failure of the respondent to make reasonable efforts," etc. I forgot whether it was Mr. Callahan or myself who first wondered whether this could lead to a quick-draw situation because the bill does not speak to the board looking at the behaviour of either the party that moved the question before the board or the respondent.

Mr. Callahan: Or raised it with the board.

Mr. Gillies: We are worried that it suddenly becomes a quick draw. Tell us whether we are wrong because I am not an expert in these things. Our interpretation was that there is suddenly an incentive to be the person who pulls the trigger to get it in there because the board will then consider the behaviour of the other party and not you. This leads us to wonder whether a fairer wording would be that the board looks at the behaviour of both parties in clauses (b) and (c).

Mr. Taylor: That point was made by George King who presented the brief on behalf of the Windsor Chamber of Commerce.

Mr. Chairman: That had slipped my mind.

Mr. Weiler: In thinking about that question, there is a further question I would put and try to answer. What purpose do people have in mind in suggesting that the statute should ask the board to consider the behaviour of the applicant, as well as the behaviour of the respondent?

There are two purposes one can have in mind. One of them might be that gives a reason to dismiss the application. Alternatively, it might be that that gives a reason to find that the application actually has merit.

If one wants to achieve the first purpose, that is valid in the situation where an applicant is trying to manufacture a spurious reason to get to arbitration, or trying to achieve what it is not able to get on the face of the legislation. One does not then have to deal with that in the sanction because if there is nothing about the behaviour of the respondent that warrants arbitration, then whatever the applicant's behaviour, whatever the applicant's motives, the situation is simply not going to produce arbitration.

That is a hypothetical possibility, and it is very unlikely to be what is going on. The more likely situation is that whoever started the fight, both parties are in the fight and nobody has totally clean hands in these disputes. I would be very much against a provision that said explicitly, or in the spirit of it, that if the applicant does not have entirely clean hands then that is a reason to dismiss the application.

Let us take a situation, for example, where an employer might have fired a key union supporter, bargained in bad faith and adopted uncompromising bargaining positions without reasonable justification, even though that is not bad faith within the meaning of the statute. The employer did all those things, took a strike, got strike replacements and continued to operate. Then there is some violence on the picket line, which is not unusual. There is evidence that the union has been doing a lot of things as well so the employer

then comes in and says: "We know we are bad but look at how bad the union has been as well. Therefore, do not order first-contract arbitration."

3:10 p.m.

That is a total mistake. The behaviour of the union in that situation, not by itself--by itself it would not be enough--is part of the larger problem. It is part of the reason you want to have first-contract arbitration. That would be another reason that the board might consider relevant in this case because not only is it likely that the parties are in serious and deep trouble and have dug themselves into a hole which they cannot get out of, but it is also likely that other parties are involved. The police are going to be involved and the community is going to be involved.

As soon as the dispute gets into the public spotlight in that way, it becomes even more difficult to make the compromises that are necessary to arrive at a first contract. I do not know what the thrust or the position of the chamber of commerce was, but if we were to write an unclean-hands principle into the statute, a principle that says if the applicant is not spotless, it does not get the order for first-contract arbitration, it would emasculate the statute. I strongly advise you against doing anything such as that.

Mr. Gillies: My final question is whether you have had an opportunity to review the amendment proposed by the United Steelworkers of America and what your comments on it might be.

Mr. Weiler: That is automatic access after a reasonable time and is functionally indistinguishable from automatic access. It is functionally indistinguishable for the reason that the prospect of arbitration is the problem. Arbitration never comes that fast anyway. Those who have been involved in the hospital area will realize it often takes a long time and it still has a chilling effect on the spirit of compromise at the bargaining table. That is what you would get if you were to adopt what I think are the cosmetic disguises of automatic access that are contained in the United Steelworkers' amendment.

Mr. Gillies: As far as you are concerned, it removes the element of uncertainty that you feel is important.

Mr. Weiler: Yes. It just postpones the time. Everybody knows the clock is running and they just have to wait a little longer for it. I might add that if you cushion the effect of the expiry of time, as the bill does, by providing that the agreement likely is going to be retroactive, then there is no substantial downside to letting the clock run.

Mr. Taylor: Professor Weiler, in listening to you, I sense you are trying to maintain a balance between labour on the one side and management on the other in terms of negotiating power. I have some concern automatic access would provide another weapon in the arsenal of labour, a strike being one and this another, to upset that balance and give labour an edge in bringing about a first contract. I might say also in a preliminary way that we have heard from lawyers for the unions and lawyers for management. It is interesting that the lawyers for the unions universally take the position that what we have in the draft bill is a bad-faith bargaining test in order to have access. On the other hand, the lawyers for management appear to take the position that we have the potential for wide-open access. This is paradoxical in a way, because

I will bet that if it goes through the way it is, they will be arguing the opposite side before the board.

Are you happy with the wording of the legislation as it is in Bill 65, bearing in mind the philosophy you pronounced today?

Mr. Weiler: Am I happy with--

Mr. Taylor: The wording of the bill. Let us deal with access first.

Mr. Weiler: Do you mean the wording of subsection 40a(2)?

Mr. Taylor: Yes.

Mr. Weiler: Yes, I am reasonably happy with it.

Mr. Taylor: Have you any suggestions as to how it could be improved? Do you see any problems with basket clause (d) or any other clause?

Mr. Weiler: If you think the basket clause, as you nicely characterize clause (d), is necessary, that is the wording one has to use. As I said earlier, I like the idea of making clear in the preamble to subsection 40a(2) that what we are talking about is a failure of the process of collective bargaining. That is the theme one wants to get across. As I read it, it seems absolutely clear to somebody who is knowledgeable about the jurisprudence of the bargaining in good faith under section 15--I guess it is in this province--that these specific bases for first-contract arbitration go beyond that. However, if people are not satisfied, it is quite simple to make it crystal clear.

Mr. Taylor: You mentioned the failure of the process as one of two points in regard to the need for the legislation, if I understood you correctly.

Mr. Weiler: That is the basic reason for having it. The inability to agree at the bargaining table is not something we should consider to be unusual, to be the end of the world, whether in labour-management relations or anywhere else. We prefer to have people agree, but lots of times they do not agree at any particular time. You cannot write a statute that guarantees there will never be disagreement at the bargaining table. What one is concerned about is some fundamental flaws in the relationship that are interfering with the process of collective bargaining, and with people entering seriously into the spirit of the enterprise and coming to grips with the tangible issues before them.

Mr. Taylor: That is the substantive part of the--

3:20 p.m.

Mr. Weiler: That is the thrust of what all this is for. I would not want it to be trivialized into a provision--having said that, I disagree with things different aspects of the union movement have asked for in these committee deliberations, as I understand them. I disagree with the union movement on this issue, but that does not mean that I do not understand its genuine concerns about the problems of litigation, delay and so on. My view is that it is mistaken about it.

I have some experience with it, and I also have this experience: About

13 years ago, when we first invented this idea of first-contract arbitration, the union movement did not want it because it thought it was going to provide automatic arbitration. The British Columbia Federation of Labour was the major opponent to first-contract arbitration in 1973, because it did not want automatic compulsory arbitration. Even in first-contract settings, it thought it would have the consequences I talked about earlier. We wrote the thing in a way that we felt made it absolutely clear it did not provide for automatic arbitration. They did not believe us. Indeed, the British Columbia Federation of Labour actually went to Manitoba to the Schreyer government. The New Democratic Party government in Manitoba was prepared to adopt first-contract arbitration and the BC federation went to Manitoba and persuaded the Manitoba Federation of Labour to force the Schreyer government to withdraw it and not put it through.

It was not until a decade later with the Pawley government that they finally got first-contract arbitration. They had a real concern about automatic access. I think we wrote it in a way that made it clear it was not automatic. We wrote the original decisions and we administered the section in that spirit. Believe me, a number of years later the BC federation was, and is, strongly committed to the idea of first-contract arbitration. As far as I know, they have not been proponents of making it an automatic entitlement.

Mr. Taylor: What has concerned me as well over the course of the hearings and in dealing with this legislation is that the problems you address may also be problems in second or third contracts. I assume one could argue the potential might be there for this to be the thin edge of the wedge, with mandated settlements spreading to other areas where they are not wanted. In terms of the length of the contract--the bill provides for two years--do you see that as wise?

Mr. Weiler: It is absolutely essential. There were things we did in British Columbia that not very long thereafter we realized were mistakes. Two things we did were mistakes. First, we said the minister had to approve before the board could have access to the case.

Mr. Callahan: Like the federal.

Mr. Weiler: Like the federal.

Second, we said the agreement could only last for one year. The reason we put both those hedges in was precisely because of the strong opposition to the whole idea from the union movement. The result of those hedges was, first, it took too long to get the process under way, and second, when you had an agreement the period during which the relationship between the parties might mature was too short. The combination of those two meant that in those cases in which we actually had to impose the agreement decertification was the ultimate result in a much higher proportion than we would have wanted.

You have to give the parties the chance to experience the reality of life under a collective agreement. The reality of life under a collective agreement is not simply an immediate wage increase. That is not the whole point of the exercise. I do not even think it is the main point of the exercise. You have to have what you have under a collective agreement, especially under the first agreement. The initial experience with having a grievance arbitration procedure is to have some protection against arbitrary discipline, unfair dismissal, favouritism in the selection of people for

promotions or layoffs and there have to be stewards who can bring complaints about those to a neutral party.

The process has to be allowed enough breathing space to let the employees realize that it is worth while. With whatever fierce resistance the employer may have had to it through the certification and the negotiation process, one year is simply not enough time. You do not want to make it a lifetime agreement. You do not want to have renewals of the agreements always subject to arbitration, because as you say, ultimately you end with a system as in Australia rather than free collective bargaining as we have here. That is something in which I do not believe the union movement is the slightest bit interested.

If first-contract arbitration is a measure worth adopting, and I think it is, you have to do it right. You have to give the collective agreement, which is the product of that process, time to have the healing effect you hope will come from the measure.

Mr. Taylor: In a brief to us, the Ontario Mining Association suggested you might have some flexibility in that clause by providing for discretion on the part of the board, a minimum of a year and not more than two years. Do you have any comment on that?

Mr. Weiler: If you are going to have discretion, there is no particular reason to say a minimum of one year and a maximum of two; you might say a minimum of one year and a maximum of three. Given that, probably the arbitrators would opt normally for something such as two years, but you might have odd months. I am a great believer in lots of flexibility for the tribunals that have to administer these statutes, because I have always been on the tribunal side rather than on the legislative side. I know that legislators, whether they are dealing with labour laws, workers' compensation laws or what have you, tend to take a different view.

If you ask me whether discretion is something that is bad, my answer is no, it is not something that is bad in this issue. If the Ontario Mining Association is saying a minimum of one and a maximum of two years, however, my response would be that if we think an arbitrator can be trusted to make the judgement that the full two years are not needed and it could be somewhat less, then why do we not want to trust the arbitrator to make the judgement that maybe more than two years and up to three years are needed?

Mr. Callahan: It makes it more uncertain too.

Mr. Taylor: The principle is simply to provide some potential for flexibility on the part of the arbitrator.

Mr. Weiler: Between one year and two years is a pretty narrow range of flexibility. If you want to have flexibility, then leave it considerably more open-ended than that. If you do not want to have a large range of flexibility, perhaps because an issue is simply too important for arbitrators to settle, then tell the arbitrators what you want. Give them a year. There is not a lot of point in having a big fight about the difference between one year and two years.

Mr. Taylor: I was not getting into the numbers game; I was getting into the concept and the principle of flexibility on the part of the arbitrator to determine what is appropriate.

Mr. Weiler: If there is reason for flexibility, it is not simply the point I have just been making. Sometimes a first contract may occur in an industry where ideally it should be tied into the general bargaining round in that industry. For example, you might be looking for a 27-month agreement or a 22-month agreement. Arbitrators are able to see that in particular cases. I know from doing hospital arbitrations, for example, that this is the point you may ultimately be trying to reach and you are tying the arbitrator's hands by singling out two years.

On the other hand, tying the arbitrator's hands in this situation is not entirely bad. There is a real virtue in telling people: "This is a legislated policy for a special situation in a first-contract negotiation. We need two years to give the contract time to have its beneficial effects, but we do not want to create a spectre of arbitrators imposing a very long agreement on parties and tying their hands from renegotiating effectively on their own." It is not something I have any particularly strong views about.

3:30 p.m.

Mr. South: Professor Weiler, I would like your comments in regard to section 19, the retroactivity of this legislation.

Mr. Weiler: I have not even thought about that issue.

Mr. South: Some have indicated that is not a very good way for anybody to do business because you did business yesterday under the rules that existed then, and now you bring in a piece of legislation and try to put back the clock.

Mr. Weiler: As I read it quickly here, it does not seem to me to be retroactive. The collective agreement will not be imposed on parties which have already reached a collective agreement or which have been decertified. For example, a union that is certified tomorrow, delivers a notice to bargain and gets into the bargaining process when this legislation is enacted, assuming that the collective bargaining relationship remains, that there is no decertification and that it has not reached a contract, is simply asking for rights under the existing legislation.

In a sense, the complaint that might be addressed to this--and I do not think it is valid--is why do you stop people who were certified in December 1973, who have not been able to reach a collective agreement for whatever reasons, from having a chance to have the matter finally settled? The reason one wants to stop them is that, eventually, these situations become too stale to do anything about. As I look at it--and it is an initial, off-the-cuff reaction--I do not see it as retroactive in any meaningful sense of that term.

Mr. South: Maybe it is because it is not as though they were imposing a contract retroactively. It is simply if the collective bargaining rights have been recognized back to that date. It is not as though it is imposing an arbitrated contract.

Mr. Taylor: In other words, it is providing access for situations.

Mr. Chairman: Okay, Mr. South?

Mr. South: Yes. Thank you.

Mr. Weiler: It is similar to an analogy. No. An analogy is too distinctive.

Hon. Mr. Wrye: I thought you were going to give us a sport's analogy. I thought you were going to use this as a chance to get a Red Sox story in.

Mr. Callahan: I have two questions. You have indicated the fragility of the arbitrated first contract and how we should try to keep out of it any recriminations, or keep them to a minimum anyway. Recognizing that, clause 40a(15)(a) states that the board can consider certain things during the arbitration of the settlement of a first collective agreement. One of its considerations is whether the parties have made reasonable efforts to reach collective agreement. We have had some witnesses who felt that was recriminatory and that it could be reflected in the board's decision, or at least presumed to have been reflected, and perhaps create an atmosphere of unhappiness on either or both parts.

Mr. Weiler: I disagree with that. I believe the idea that is reflected in clause 40a(15)(a) is appropriate. I would use a different phrase. I do not think recriminatory is the appropriate phrase, but rather that it is preventive. It goes back to the theme I talked about earlier with respect to access. The idea of this measure is that its success will be most visible the less often you have to use it. You have to give parties a reason not to use it rather than giving them reasons to use it.

Let us take a case of an employer, although actually in this situation in British Columbia we also have an illustration of this involving a union, where the union was the party that was primarily responsible for the failure of the process. If an employer has adopted entirely unreasonable and uncompromising positions at the bargaining table and does so because it thinks the worst that can happen if it gets to arbitration is that it is going to have a reasonable contract--reasonable, average, whatever it might be--that is the downside for that employer.

Meanwhile, it might win in the litigation or the proceedings in front of the board under proposed subsection 40a(2). It might also get something better from an arbitrator and is wearing down the employees and the union in the interim. That is not a sufficient disincentive to employers for putting themselves and their unions in a position where the union is going to have to be using section 40 as a whole. I think there is some virtue and a downside risk to forcing the board to impose an agreement.

The first contract we imposed in the London Drugs case in British Columbia had some pretty generous terms for the union because of the behaviour of the employer. As soon as the employer community and its labour lawyers realized that was the prospect if they got to the board, the sooner the message got through that they had better make a reasonable, bona fide effort to settle at the bargaining table and not take their chances at the board.

Mr. Taylor: That is recrimination.

Mr. Callahan: It creates the big chill. It is even more chilling than--

Mr. Taylor: That is just recrimination. On the flip side of that, you are going to have workers, the people who are actually sweating it out in the shop, suffer because of the union's stance, which was unreasonable. Would

the arbitrator do that? Is there not mutuality and reciprocity when the arbitrator is dealing with these things? If you are coming in with the potential for recrimination because of previous action, whether it is by the union or management, then one party or the other is going to suffer. The party that suffers is not the institution of the union; it is the workers.

Mr. Weiler: No, that is not true. Indeed, in one case I can think of, the union had behaved in an extremely heavy-handed fashion in dealing with the employer. When we settled the agreement, we did not give that union a union security clause. Believe me, unions got that message as well and tended to behave a little more sensibly in the negotiation of contracts.

Mr. Callahan: The effect of that decision would send out a clear message to both sides to give them a big chill in terms of coming to an agreement.

My second question concerns something that came up during the testimony of the witnesses we heard with respect to the effect of proposed subsection 40a(12). They were a bit unhappy about the the words in the fifth line down, "because of the permanent discontinuance of all or part of the business of the employer." They gave us the example that if during the strike, business just fell off naturally, but not as a result of the strike--and just to take the most significant example, if it fell off by 50 per cent or 60 per cent--would that section require them to bring back the full labour force and lock them in until a collective agreement was arrived at?

Mr. Weiler: If that were the intention of the section, I think it would be a serious mistake, but I do not think it is. As I read the whole of clause 40a(11)(b), the proviso at the end gives the board that is making the decision--

Mr. Callahan: You are saying that would clarify it.

Mr. Weiler: It is very important that the board have that flexibility to relieve against the unreasonable effect of this general rule about an end to the work stoppage and a return to work. As I read it, it is there.

Mr. Chairman: I can tell just by looking at you, Mr. Mackenzie, that you have a question.

Mr. Mackenzie: Just one, Mr. Chairman. For the record, Professor Weiler--and this probably will not surprise anybody--I simply cannot buy your argument that easier accessibility in the legislation will mean a lessening of the bargaining process or will cause us the type of problems that are raised.

First, I have a little more confidence in what I know is the position of the trade union movement. I am not one who has come early to this idea of first-contract arbitration. It has probably been only in the past four or five years, specifically because of some of the cases that we have had in Ontario, that I have been led to it. I do not know how you would look at the Eaton's situation and the fight the union went through there in trying to determine bad faith, and not get some indication of the need for it. Till today, I had not had anybody tell me that they really thought they could have accessed in the case of the Eaton's situation.

The other thing I am reminded of is the arguments that we had over misuse of new legislation. I can think particularly of safety and health

committees and what a risk we were running if we set up those. It has not proved to be true. On that issue, I am at odds with you. One question I do have is whether you offered or were asked for any advice or assisted the deputy in any way at all in drafting this bill in Ontario.

Mr. Weiler: There are two parts to that question. Considering the fact that I have been involved in this issue for about 12 or 13 years, one would have expected that I did provide some advice to the minister, the deputy and a number of other people about it. I did not participate and was not involved in the drafting of Bill 65.

Hon. Mr. Wrye: To flesh that out, Professor Weiler is doing work, and has been for some time, on phase 2 of workers' compensation reform. In August or September, I believe you were in for half a day, Paul, and we spent a good deal of the time on that. Then, since we were doing a very thorough consultation on the matter of first contract at that point, we had some options that we were developing and discussing and we reviewed those with you.

Mr. Weiler: I helped John Munro and his staff by giving them my views and suggestions about the drafting of the provisions in the Canada Labour Code; Daniel Johnson, then the Minister of Labour in Quebec, when he drafted the provisions in the Quebec Labour Code; and Mr. Wrye and his officials here.

Mr. Chairman: If there are no other questions or comments, thank you very much, Mr. First Contract of Canada. We appreciate your appearance before the committee because the members of the committee have been wrestling with those very questions that were put to you today.

Mr. Weiler: Thank you, Mr. Chairman. It has been my pleasure.

Mr. Chairman: This wraps up the public hearings process of Bill 65. When we come back, I suggest to the committee that we not try to wrestle with clause by clause the first week back, but rather get into it in the second week. The minister has indicated that he will be present for the clause-by-clause debate in case there are any amendments to be put to the bill. If there are no other comments or questions, we are adjourned until the call of the chair the second week back.

The committee adjourned at 3:47 p.m.

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